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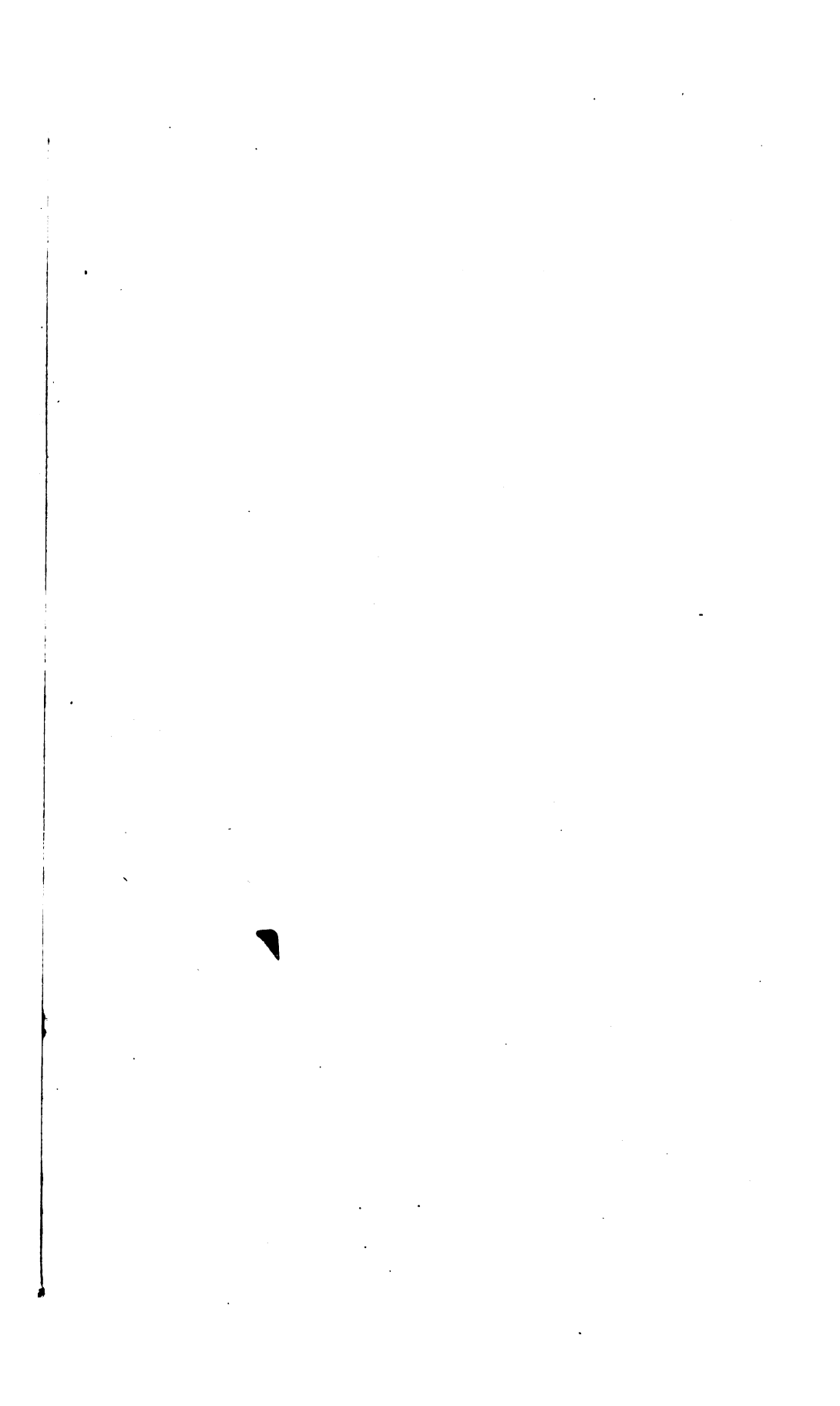
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R E P O R T S

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. V.

Containing the Cases of HILARY, EASTER, and TRINITY Terms, in
the 6th & 7th Years of GEO. IV. 1826.

L O N D O N :

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AND J. COOKE, ORMOND-QUAY, DUBLIN.

1827.



J U D G E S
OF THE
COURT OF KING'S BENCH,
During the Period of these REPORTS.

Sir CHARLES ABBOTT, Knt. C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLBOYD, Knt.
Sir JOSEPH LITTLEDALE, Knt.

ATTORNEY-GENERAL
Sir JOHN SINGLETON COPLEY, Knt.

SOLICITOR-GENERAL
Sir CHARLES WETHERALL, Knt.



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ARGUED AND DETERMINED

1826.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Sixth and Seventh Years of the Reign of
GEORGE IV.

BYERLEY *against* **WINDUS** and Others, Principal
and Ancients of Staple Inn. *

PROHIBITION. The declaration, after reciting that the parish of *St. Andrew, Holborn*, was from time immemorial an ancient parish, and that within it there was an ancient parish church during all that time sustained, supported, and repaired by and at the costs and charges of the parishioners; that service was always there performed by the rector of the parish, who received all dues, oblations, and tithes from the parishioners of the parish, and none others; that

Extra-parochial persons cannot establish a claim to seats in the body of a parish church, without proof of a prescriptive title; and, therefore, if they sue in the ecclesiastical court, to be quieted in the possession of such seats, this court will grant a prohibition: Semble, that they cannot establish such a claim even by prescription.

* This and the several following cases were decided at the sittings in banc before this term.

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the population of the parish had during all the time aforesaid, been much larger than could be accommodated with seats in the church, and that neither the defendants nor the principal or ancients of *Staple Inn* had from time immemorial possessed, had, or enjoyed any pews or seats within the said church, nor had any or either of them any right to possess, have, or enjoy any pews or seats in the church, &c. proceeded as follows; yet the said defendants intending, &c., on the 7th *December* 1821, caused to be exhibited in the consistorial court of *London*, a certain libel on articles, objecting, articling, and libelling against plaintiff and *A. B.*, since deceased, as churchwardens of the parish aforesaid in manner following: First, that *Staple Inn* is extra-parochial, and surrounded on all sides by the parish of *St. Andrew, Holborn*, and inhabited by a society known by the name of the society of *Staple Inn*, heretofore lawfully constituted as one of the inns of court of Chancery, and that the society have not had or enjoyed any sittings in any church or chapel whatsoever, saving the church of *St. Andrew, Holborn*. Second, that from time immemorial certain pews and seats hereinafter more particularly mentioned, (and which said pews and seats so claimed by the said defendants, are in the body of the said parish church of *St. Andrew, Holborn*,) have been appurtenant to the said inn, and have been exclusively possessed by, used, had, and enjoyed by the principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid, with the privity, knowledge, and consent of the rector, churchwardens, and parishioners of the said parish of *St. Andrew, Holborn*; and in or about the year 1688 they, the said principal and ancients, or grand fellows of the said society for the time being, re-erected
and

and rebuilt, or caused to be re-erected or rebuilt, with the like privity, knowledge, and consent, the said seats or pews in the said parish church of *St. Andrew, Holborn*, being seven in number, at their own cost and expence; and from that time have repaired and beautified the same from time to time, whenever occasion required, at the sole expence of the funds of the said society: That the principal and ancients, or grand fellows of the said society, for several centuries last past, have been in the constant habit of attending divine service in the said parish church, and of occupying and sitting in the said seven seats or pews marked or numbered 9, 10, 11, 12, 13, 14, and 15, and during the whole of the said period of time the doors of the said seats or pews were kept constantly locked, and the keys thereof remained in the possession of the butler, or some other person in office in or belonging to the said inn: That on the said principal and ancients, or grand fellows leaving the said pews, the said butler constantly locked the doors of the said pews, bringing the keys away with him, and that down to the 17th day of *May* 1818, the said principal and ancients, or grand fellows, or some or one of them, constantly sat in, and used, occupied, and enjoyed the said seats or pews marked numbers 9, 10, 11, 12, 13, 14, 15, without the least hinderance or molestation whatsoever from the rector, churchwardens, or parishioners of the said parish of *St. Andrew, Holborn*; and that down to such time the parishioners of the said parish did not incur any expence whatsoever of building, re-building, repairing, or beautifying the said seats or pews: That the said society have occasionally, voluntarily, contributed sums of money towards repairing.

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and beautifying the said parish church of *St. Andrew, Holborn*, and the steeple belonging thereto, and also paid the sexton and others of the said parish from time to time for their respective care and trouble in and about the said seats and pews marked and numbered as aforesaid, and which said charges and expences were duly entered in the books and accounts of the said society, at or about the respective times the same appear to bear date, in the words and figures following, to wit, &c. And the said libel and articles then further proceeded to object against the said plaintiff and *A. B.*, deceased, that in 1818 the rector, churchwardens, and parishioners of *St. Andrew, Holborn*, or some of them, removed the seats, that immediately the principal and ancients complained by letter, &c., but were not restored; and concluded by praying that the present plaintiff and *A. B.*, deceased, might be admonished to permit the said principal and ancients to have free access to their seats or sitting places in the aforesaid seven seats or pews, and that the said *Byerley* and *A. B.*, and their successors for the future, should refrain from disturbing the said principal and ancients in their quiet and peaceable sitting therein, and that they might be condemned in the costs of that suit, and that otherwise right and justice might be done and administered in the premises. The declaration then stated that the defendants below objected to the libel, but Sir *C. Robinson*, vicar general and official principal of the said consistorial court admitted it. And after the said court had so admitted the said libel, the present defendants tendered to the said court certain witnesses to be sworn and examined on and concerning their said libel, and exhibit, and afterwards, to wit, on,

&c.,

&c., at, &c.; the said present plaintiff was required by the said spiritual court, at the instance of the present defendants, to give his perfect answer to the several positions or articles of the said libel so given in and admitted as aforesaid. Whereupon the said present plaintiff afterwards, to wit, on, &c., carried into the said spiritual court his personal answer to the several petitions and articles of the said libel, and was then and there duly sworn to the same. The personal answer was then set out, of which the material part was as follows: "That the said *N. Byerley* doth not know or believe that from time immemorial the pews and seats articulate were exclusively possessed, used, had, and enjoyed by the principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid, but he admits that for a great number of years last past, they have so possessed and enjoyed them, and some of the said pews and seats may have been for a great number of years used occasionally by the principal and ancients, or grand fellows of the said society, but others of them have, as he believes, been let by the said society, to persons not belonging to the same, for money; but, whether or no the said pews and seats, or any of them, were possessed, or used, had, or enjoyed by the said society, with the privity, knowledge, and consent of the rector, churchwardens, and parishioners of the articulate parish of *St. Andrew, Holborn*, he knows not, and has no sufficient means of forming a belief or disbelief thereon. And his respondent doth not believe that the said pews and seats, or any of them were appurtenant to the said inn, the said inn claiming to be extra-parochial, and not having paid any rates for the reparation of the parish church."

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Notwithstanding which said personal answers, and the illegality of the said former proceedings, and of the matters contained in the said libel, and although plaintiff afterwards, to wit, on, &c., delivered to the said defendants the writ of prohibition of our lord the King to the contrary thereof, yet the defendants have not ceased further to prosecute the said plea in the said spiritual court.

Plea as to prosecuting contrary to the royal prohibition, general issue. But, in order to have a consultation in this behalf, defendants say that they have a possessory right to the use and enjoyment of the said pews and seats in the said libel and declaration mentioned, grounded upon a usage of divers, to wit, 100 years, and that according to the usage of the said court christian, such possessory right is a sufficient foundation for the said court christian proceeding to decree and give sentence that the said plaintiff should be admonished to permit the said principal and ancients and grand fellows of the said society of *Staple Inn* aforesaid to have free access to their seats or sitting places in the said seven seats or pews in the said libel and in the said declaration mentioned; and that the said plaintiff and his successors should for the future refrain from disturbing the said principal and ancients or grand fellows of the society of *Staple Inn* aforesaid in their quiet and peaceable sitting therein; and that according to the usage and course of proceeding in the said court christian for the purpose of the said court christian so decreeing or giving sentence upon such libel so exhibited in the said court christian in the said declaration mentioned, it is not necessary that the said defendants should allege or prove that from time immemorial the
said

said pews and seats in the said libel and in the said declaration mentioned, were appurtenant to the said inn of chancery, and were exclusively possessed, used, had, and enjoyed by the said principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid, by and with the privity, knowledge, and consent of the then rector, churchwardens, and parishioners of the said parish of *St. Andrew, Holborn*; and that according to the said usage and course of proceeding of the said court christian, the denial in the said personal answer of the immemorial exclusive possession, use, and enjoyment of the said pews and seats by the said principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid does not put in issue the existence of such immemorial exclusive possession of the said pews and seats as aforesaid, and does not form or constitute an issue whereon the said court would proceed to give sentence or judgment on such immemorial exclusive possession as aforesaid, and so the said defendants in fact say that no denial in the said personal answer in the said declaration mentioned, or in any plea in the said court christian hath hitherto been made of such immemorial exclusive possession as aforesaid, so as to put the same in issue, and that no issue on such immemorial possession as aforesaid hath been or is yet joined by the said personal answer, or in any plea in the said court christian; and this they, the said defendants, are ready to verify: wherefore they pray judgment, and his majesty's writ of consultation to be granted to them in this behalf, &c. Demurrer and joinder. The case was argued at the sittings after *Michaelmas* term by

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Merewether in support of the demurrer. Two points will be made in support of the plea in this case; first, that a possessory right is sufficient to entitle the present defendants to a decision of the ecclesiastical court in their favor; second, that there is no issue joined there upon the prescription, and that consequently a prohibition ought not to be granted. It must be remembered that this suit is between persons who are not parishioners, and the churchwardens of *St. Andrew's*; now, as against the latter, a possessory title is not sufficient, *Pettman v. Bridger* (a). If that be so, then possession can give no right, unless it be of so long continuance as to raise the presumption of a faculty, *Stocks v. Booth* (b). But in this case no faculty is alleged, the defendants rely on a prescriptive right to the pews as appurtenant to *Staple Inn*. They say that *Staple Inn* has existed from time immemorial, and that they have for all that time had the seats in question as appurtenant. Now a seat appurtenant to a house can only be claimed in a court of common law, *Hutton's case* (c), *Eaton v. Ayliffe* (d). A prescription for 100 years, according to the plea, suffices in the ecclesiastical court, but that is contrary to the common law, and must therefore yield to it, 3 *Bl. Comm.* 112. Besides, the seats claimed in this case are in the body of the church, not in the aisle, and for such seats a man cannot prescribe, *Pym v. Gorwyn* (e). Nor can a seat be granted to a man and his heirs, for then he would have it though he should cease to reside in the parish,

(a) 1 *Phil.* 316.(c) *Latch.* 116. *Noy.* 78.(e) *Moore*, 878.(b) 1 *T. R.* 428.(d) *Hetley*, 94.

Brabin

Brabin v. Trediman (a). The present claimants are not residents within the parish. This distinction between parishioners and non-parishioners is recognized in *Clifford v. Wicks* (b), and *Mainwaring v. Giles* (c). The body of the church is repaired by the parishioners, it is therefore against reason, as well as law, that strangers should come in to their exclusion. The second question is, Whether there is a sufficient denial of the prescription? If the pews cannot be claimed except by prescription, and the parties claiming are not in a situation to prescribe legally, this question does not arise. This court must inquire whether the ecclesiastical court is proceeding regularly; if the proceedings there are in any way contrary to the common law, a prohibition must go. Now they are proceeding below upon a claim by prescription, if that cannot be good, the ecclesiastical court must be wrong. It may be admitted that when in a suit for tithes a modus is set up a prohibition will not immediately be granted, for non-constat that the modus will be denied. But there the ecclesiastical court have properly jurisdiction over the subject matter of the suit, and the modus comes in collaterally. *Hutton's case* (d) and *Eaton v. Ayliffe* (e) shew this distinction between a claim of tithes and pews. In *Darby v. Casens* (f), *Ashhurst* and *Buller*, Justices, seem to think that even in a suit for tithes the setting up a modus puts an end to the jurisdiction of the ecclesiastical court. It is not, however, necessary in this

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(a) 2 Roll. Rep. 24. Poph. 140. S. C.

(c) 5 B. & A. 356.

(e) Hetley, 94.

(b) 1 B. & A. 498.

(d) Latch. 116. Noy. 78.

(f) 1 T. R. 552.

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case to contend for that point. The ecclesiastical court may have jurisdiction to decide between parishioners, but not in this case. In *Jacob v. Dallow* (a) the defendant was a mere wrong-doer, against him therefore a possessory right was sufficient. Besides, on those pleadings the plaintiff, by demurring, admitted the traverse of the prescription, and the prescription itself as alleged was merely that which is so in the ecclesiastical court, viz. for a period of forty years; that court therefore might take cognizance of it. In the present case the defendants cannot get rid of this difficulty, they claim by prescription, and upon that the ecclesiastical court have no jurisdiction to proceed. There is no claim but by prescription, that therefore is the only thing for discussion. Now in *French v. Trask* (b) it was held that where there is nothing to try in the spiritual court but a prescription, a prohibition must be granted, although there has not been any formal denial. If the ecclesiastical court proceed on the possessory title, that is a ground varying from the claim in the libel, and is not a good ground of proceeding, because it cannot avail except as against parishioners.

Taunton contra. There are two material questions in this case; first, whether the proceedings in the court below are ripe for a prohibition, i. e. whether upon the face of this record any ground for a prohibition is shewn; second, whether the ecclesiastical court have jurisdiction over the subject matter of the libel. If the

(a) 2 *Ed. Raym.* 755. 2 *Salk.* 551.(b) 10 *East*, 348.

question had arisen in a special action upon the case for a disturbance, which could only be founded on a prescriptive title, and that had been set out in the declaration, and the claim stated to be in respect of a house, situate out of the parish, then, on motion in arrest of judgment, the argument against the plaintiff's right to recover might have prevailed. But that is very different from the present case. The declaration sets out the libel, and it must be admitted that the libel (incidentally and unnecessarily, and not as the foundation of the claim,) alleges, that from time immemorial the society of *Staple Inn* have held the pews in dispute. But the prayer of the libel is the important part; now, the plaintiffs below do not pray that the spiritual court will proceed on the prescription, or establish a supposed prescriptive title, but that the defendants below may be admonished to permit them to have free access to their pews, and that the defendants and their successors may be restrained from disturbing them in their quiet and peaceable sitting therein. The defendants below were churchwardens, the officers and servants of the ordinary, and the libel merely prays an admonition to them as such to abstain from the tortious acts complained of. Then the personal answer does not contain any direct denial of any thing in the libel, and admits that the society of *Staple Inn* have for many years had exclusive possession of the pews. Until some distinct issue is joined, upon a matter not triable in the spiritual court, this court will not interfere by prohibition. It is a question of fact whether the personal answer to the libel is so far in the nature of a plea as to constitute an issue. The defendants have here pleaded that the personal answer does

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does not constitute an issue, so that it cannot contain any such denial of the immemorial exclusive possession as to put the same in issue. After libel, the plaintiff in the spiritual court may compel the defendant to answer on oath, which is analogous to the bill and answer in equity, but issues can only be joined by affirmative or negative issues, 2 *Oughton's Ordo Judiciorum*, tit. 61, 62. This court will not interfere on the personal answer alone, *Johnson v. Oldham* (a), *Dike v. Brown* (b), *Stone v. Harwood* (c), *Boughton v. Hustler* (d), *Dutens v. Robson* (e). The only authority on the other side is *French v. Trask* (f), but the ground of that decision was, that there was nothing but the modus to be tried; and there, too, it was taken for granted that the personal answer was equivalent to a plea. It is clear that the ecclesiastical court have exclusive jurisdiction over claims to seats in a church, with the exception of those by prescription or faculty. [*Bayley J.* That is wherever the claim to the pew is a temporal right.] *Watson's Clerg. Law*, c. 39., 3 *Inst.* 202., *Ayliffe's Parergon*, 484, *May v. Gilbert* (g): which also proves that with respect to prohibitions, there is no difference between suits for tithes and other matters; and it appears that the pew was in that instance claimed by prescription. [*Bayley J.* It does not appear that the party claiming was not a parishioner.] It does not, but *Cross v. Salter* (h) shews that the ecclesiastical court will admonish a wrong-doer not to disturb a person in possession of a pew, although

(a) 1 *Ld. Raym.* 609.(c) *Cas. temp. Hardw.* 357.(e) 1 *H. Bl.* 100.(g) 2 *Bulstr.* 150.(b) 2 *Ld. Raym.* 835.(d) 3 *Gwill.* 951.(f) 10 *East*, 348.(h) 3 *T. R.* 639.

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he has no well-founded title to the pew. *Pettman v. Bridger* (a) also shews that that court will proceed upon a mere possessory right; and the same may be collected from *Gray v. Rector of Hornsey* (b). In *Jacob v. Dallow* (c) *Holt C.J.* says, "The defendant, if he pleases, may sue upon his prescription in the ecclesiastical court to have his possession quieted, which the ordinary ought to do upon the foundation of his usage to have sat there." And he afterwards says, "If the defendant had no extraordinary title, yet he had the possession, and being disturbed in it, the ordinary has conusance of the disturbance, and may settle and quiet the possession according to the usage, no temporal right being infringed." *Davis v. Wits* (d) shews that a seat in the aisle of a church may be prescribed for in respect of a house out of the parish. [*Bayley J. Gibson's Codex*, 198. 362. lays down the same thing.] The reasoning on the other side would exclude from the aisle as well as the body of the church, for there is not in principle any distinction between them. *Burton v. Bateman* (e), *Ashly v. Freckleton* (f), and *Kenrick v. Taylor* (g), all distinctly shew that a possessory title is sufficient against a wrong-doer. The possessory title in this case is expressly admitted by the personal answer, and no temporal right is put in issue in the court below. That court has jurisdiction to decide whether such possessory right can exist in persons not parishioners, it is all that they are called

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(a) 1 *Phill.* 316.(c) 2 *Id.* *Raym.* 756.(e) 1 *Id.* 88. 201.(g) 1 *Wils.* 326.(b) 1 *Hag.* 194.(d) *Forrest*, 14.(f) 3 *Lev.* 73.

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upon to decide, and this court ought not to prohibit them from so doing.

Cur. adv. vult.

BAYLEY J. This was a case of prohibition. The plaintiff was surviving churchwarden of the parish of *St. Andrew, Holborn*, and the defendants the principal and ancients or grand fellows of *Staple Inn*. The suit to which the prohibition referred was in the consistorial and episcopal court of *London* in respect of seven pews in the parish church of *St. Andrew, Holborn*, and was against *Byerley* the plaintiff, and *William Boyer*, since deceased. The libel below stated that the messuage, house, or inn of Chancery, called *Staple Inn*, is extra-parochial, and surrounded on all sides by the parish of *St. Andrew, Holborn*; that it is of very ancient standing, and inhabited by a society called the "Society of *Staple Inn*;" that the society has no sittings in any church but *St. Andrew's, Holborn*; that from time immemorial certain pews were appurtenant to the said inn, and were exclusively possessed by the principal and ancients; that about the year 1688, the then principal and ancients rebuilt them at their own expence, and from that time have repaired and beautified them; that the principal and ancients for several centuries had been in the constant habit of occupying them; that the doors were kept constantly locked, and the key remained in the possession of the officer of the inn; that formerly they used to go and return in procession in their gowns, headed by the porter with his staff, and the arms of the inn thereon, and that they used the pews without interruption till *May 1818*; that the parish never incurred any expence in building or repairing the said pews; that
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the principal and ancients have occasionally voluntarily contributed towards repairing and beautifying the church and steeple, and paid the sexton and others for their care and trouble about the said pews; that in *May* 1818 the parish repaired the church, and removed these pews; that the principal and ancients immediately remonstrated, and put in their claims, and insisted on their right to rebuild their pews, and offered to pay for them if the parish built them; that the parish built seven pews on the scite of the ground belonging to the principal and ancients, and the principal and ancients thereupon gave notice that on the re-opening of the church they should demand the occupation of the pews, and that after having postponed the demand to prevent a disturbance on the day they had fixed, they made it on the 13th of *June* 1819, and were refused admittance by the then churchwardens; that they renewed their demand on the 3d *November* 1821, and were refused admittance by *John Boyer*, one of the then churchwardens; that from *April* 1818 till *May* 1819 *Harwood* and *Buzzard* were churchwardens; that from 13th *May* 1819 to 4th *May* 1820 *Buzzard* and *Boyer* were; that from 4th *May* 1820 till 24th *May* 1821 *Boyer* and *Byerley* were, and that on the 24th *May* 1821 they were again sworn in for the year ensuing: and the prayer of the libel was, that *Byerley* and *Boyer* might be admonished to permit the principal and ancients to have free access to their pews; that they and their successors might be restrained from disturbing them in their quiet and peaceable sitting therein, and that *Byerley* and *Boyer* might be condemned in costs. This libel and an exhibit thereto were admitted in the spiritual court. The principal and ancients tendered witnesses to be sworn and examined concerning the said libel and exhibit, and

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Byerley was required, at the instance of the principal and ancients, to give his personal answer to the several positions or articles of the libel, and he did so accordingly. The personal answer in that part which applies to the position, that from time immemorial the pews had been appurtenant to the inn, and exclusively possessed by the principal and ancients, states, that he does not know or believe that from time immemorial the pews were exclusively possessed by the principal and ancients, but he admits, that for many years they have been so possessed: and after other statements as to what he knows or believes as to the rebuilding in 1688, and other matters of later date, he concludes by saying, that further or otherwise he doth not admit, but denies the said position or article to be true.

The declaration in prohibition states, that the pews in question are in the body of the church, and this is not controverted by the defendants. The defendants in their plea, after the formal denial of the contempt, state, that they have a possessory right, founded upon an usage of divers, to wit, 100 years, and that such possessory right is a sufficient foundation for the court christian to admonish the plaintiff to permit the defendants to have free access to these seats, &c. ; and that according to the usage in the court christian, for the purpose of so decreeing upon such libel in the said declaration mentioned, it is not necessary defendants should allege or prove that the pews were appurtenant to the inn, and exclusively possessed by and with the privity and consent of the rector, churchwardens, and parishioners of the parish; that the denial in the personal answer of the immemorial exclusive possession does not, according to the course of proceeding in the court christian, put in issue the
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immemorial exclusive possession; that no denial in the said personal answer, or in any plea in the court christian, has been made of such immemorial possession, so as to put the same in issue, and that no issue on such immemorial possession has been joined in or by the said personal answer, or in any plea in the court christian. To this plea the plaintiff has demurred, and the defendants have joined in demurrer.

Upon this statement of the pleadings, it appears that the suit below was in respect of seven seats, not in an aisle or in the chancel, but in the body of the church, not by parishioners, but by non-parishioners, persons residing out of the parish, but in an extra parochial place; that it was a suit not for a faculty *ex gratia*, but for an admonition to the churchwarden, as churchwarden, *de jure*; that it is founded, not upon any act of disturbance by *Byerley*, against whom the suit is continued, but upon acts of disturbance partly by his predecessors, and partly by his colleague, and that the *de jure* right the plaintiffs below have set out in their libel is, that from time immemorial the pews have been appurtenant to their inn, and exclusively enjoyed by it, and that the inn has rebuilt, repaired, and beautified them. It was admitted upon the argument on the part of the inn, that the claim below was a claim by prescription, but it was insisted that prescription was not the foundation of the suit, that a possessory right without prescription was sufficient to entitle the inn to a sentence below, and if not, that the state of the proceedings below did not *at present* warrant the prohibition. The first question, therefore, I shall consider is, whether a possessory right could *in this case* have existed without a prescription; for if not, the argument

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that a possessory right without prescription would have entitled the inn to a sentence below, fails. The claim in question is by non-parishioners in respect of a messuage or messuages out of the parish. It is true the claimants live in the messuages in respect of which they claim; that those messuages are in no *parish*, but are extra-parochial, and surrounded on all sides by the parish of *St. Andrew*; but what right can the inhabitant of an extra-parochial place have in the body of a parish church except by prescription? He contributes to none of the expences of the church; they are borne exclusively by the parish. He contributes nothing to the maintenance of the minister or other officers; they are supported exclusively by the parish. And to whom does the use and enjoyment of the body of the church belong? To the parish and its inhabitants. The ordinary, indeed, has the right of disposing of the seats; but can he dispose of them to a non-parishioner? I apprehend not. Is not his right confined solely to resident parishioners? I take it to be clear that it is. Why is a faculty for a pew to a man and his heirs bad? Because it professes to give the right whether the man and his heirs continue resident or not (*a*). Why cannot a seat be claimed either by faculty or prescription as appurtenant to land? Because it is in respect of *inhabitan-* *bitancy* that it is to be used (*b*). Why, if a man quits the parish, is his right to use a seat, whatever was the nature and origin of that right, at an end? Because he has ceased to be a parishioner (*c*). Why, if a seat is appurtenant to a house, cannot the owner of the fee restrain his tenant from the use of it. Because the

(*a*) *Gibs.* 221. 1 *Hagg.* 321. 2 *Addams*, 427.

(*b*) *Gibs.* 222. *Co. Litt.* 121 *b*.

(*c*) 2 *Addams*, 427.

seat is for the benefit of the house, for the inhabitant of the house, not for the benefit of the owner if he cease to inhabit it (a). Gibson in his *Codex*, tit. 9. c. 4., under the head of *Rules of Common Law concerning the repairing and ordering of Seats*, says, "Of common right, the soil and freehold of the church is the parson's, the use of the body of the church and the repair of it common to the parishioners, and the disposing of the seats therein the right of the ordinary. And generally where the parishioners repair, the ordinary shall dispose. These heads are every where laid down in the cases on this subject, and have never been disputed." In the case which was cited of *Pettman v. Bridger* (b), Sir John Nicholl states the rule to the same effect, but he restrains the right of the ordinary to a distribution among parishioners. "By the general law, and of common right," he says, "all pews belong to the parishioners at large for their use and accommodation, but the distribution of seats among them rests with the ordinary. The churchwardens are the officers of the ordinary; they are to place the parishioners according to their rank and station, but they are subject, upon complaint, to the control of the ordinary." In *Fuller v. Lane* (c), in a very able and elaborate judgment, Sir John Nicholl lays down the same doctrine. "By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are all entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all;" and after laying down this as the general rule, he states, among

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(a) 1 Hagg. 319.

(b) Phill. 325.

(c) 2 Addams, 425.

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other positions, "that no faculty is deemed, either in the spiritual court or at common law, good, to the extent of entitling any person who is a *non-parishioner* to a seat even in the body of the church." Again, "whenever the occupier of a pew in the body of the church, ceases to be a *parishioner*, his right to the pew, however founded, and how valid soever during his continuance in the parish, at once ceases and determines." Again: "Of pews annexed by prescription to certain messuages, it is often erroneously conceived that the right to the pew may be severed from the occupancy of the house: it is no such thing; it cannot be severed, it passes with the messuage, the tenant of which, for the time being, has also de jure, for the time being, the prescriptive right to the pew." Lord *Stowell* lays down this last position in 1 *Hagg*, 319—321.; and in 1 *Hagg*, 194—314, Lord *Stowell* states that every *housekeeper* has a right to call upon the parish for a convenient seat; that if an inhabitant wants a pew, the churchwardens ought not to permit an occupancy by a non-inhabitant. They ought not in such a case to let to a non-inhabitant, nor permit prescriptive pews to be so let." A distinction being thus established between parishioners and non-parishioners, can a distinction be also made among non-parishioners, between those who belong to another parish and those who do not? Upon what principle can such a distinction stand? The extra-parochials infringe equally upon the rights of the parishioners with those who belong to another parish. They are equally non-contributory to the expences of the church. It is the fault of those under whom they claim that they have no parish. They have the advantage of being extra-parochial; they must take the dis-

disadvantages also. Upon authority, therefore, and upon principle, I am of opinion that extra-parochials cannot claim a pew in the body of a church otherwise than by prescription, if they could do so by prescription; and, consequently, that there could have been no possessory right in this case without prescription.

It was urged, however, upon the argument that such possession as the principal and ancients had exercised was sufficient to sustain a suit by them against a wrong-doer, and that *Byerley*, the plaintiff, was in this case to be deemed a wrong-doer; but a sufficient answer to that argument is, that *Byerley* personally is not charged to have given to the inn any interruption, and that it was the duty of the churchwardens, as officers of the ordinary, to secure the rights of the parishioners from the encroachment of strangers. And this brings me to the second question, whether the proceedings are in such a state in the court below as to warrant a prohibition *at present*. Where the spiritual court has jurisdiction over the subject matter, it will have jurisdiction equally, whether the claim is founded upon prescription or upon any other right; it is only when the spiritual court is proceeding *towards the trial of the prescription* that a claim by prescription furnishes ground for a prohibition. If the prescription is admitted, the spiritual court may go on with the cause; and this was the foundation of the consultation in *Jacob v. Dallow* (a). But when once it appears by the proceedings in the spiritual court, that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the courts of common law are not bound to wait till the parties have incurred

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(a) 2 Salk. 551. 2 Ld. Raym. 755.

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the expence of *putting it in issue*, but the prohibition is grantable *at once*; and it was upon this principle that the prohibitions were granted in *Darby v. Cosens* (a), and in *French v. Trask* (b). Each of those was a suit for tithes; in each a modus was pleaded; and a prohibition was granted in each without any issue below upon the existence of the modus. In the latter case it was urged that the application for the prohibition was too early, because there was no issue upon the modus; but Lord *Ellenborough* answered, “there was nothing the spiritual court could do, but try the modus.” The cause was necessarily in progress towards such trial; there was no alternative. If the modus existed, it necessarily destroyed the right to the tithes the suit claimed. And it appears sufficiently upon the pleadings in this cause that the suit below is in progress towards the trial of the prescription. Why otherwise did the principal and ancients tender witnesses to be sworn and examined concerning the libel? Why was *Byerley* required, at their instance, to give his personal answer to the several positions or articles of the libel? If the prescription was admitted, why should witnesses be tendered to be sworn and examined *generally to the whole of the libel*? Why should *Byerley* be required to state his personal answer *generally to all* the positions and articles? If the prescription were admitted, there could be no occasion for a *general examination, or a general answer* to the whole of the libel; the examination and answer would have been limited to such parts as were not admitted. It is true the plea in this case states that, according to the usage in the court christian, it was not necessary, in support of his libel, to have alleged or proved such a

(a) 1 T. R. 552.

(b) 10 East, 348.

prescription as that plea states; that the denial in *Byerley's* personal answer did not put in issue the immemorial exclusive possession; that no denial in the personal answer, or in any plea, has been made of the immemorial possession, so as to put the same in issue; and that no issue on such immemorial possession has been joined in or by the personal answer, or in or by any plea in the court christian. And all this is true, but it is not the whole truth. And if the plea were framed by any one acquainted with the course of proceeding in the spiritual court, it was artfully framed to impose upon the ignorance of those to whom such course of proceeding was not known. According to the usage and course of proceeding in the court christian, neither the personal answer nor plea ever put in issue any of the facts in a libel. They are put in issue or admitted by a previous step, a negative or an affirmative issue; a negative issue denying what the libel states, an affirmative issue admitting it. A personal answer is one of the consequents upon a negative issue, and is required, at the instance of the plaintiff below, to supply him with proof of what is previously in question by the negative issue. A plea is a statement of new matter. The defendants, therefore, in this case might safely state in their plea that the immemorial usage was not put in issue by the personal answer, or by any plea. But they could not truly have stated that it was not in issue, for it must have been put in issue by a previous negative issue. So their other statement, that according to the course of proceeding in the court christian they were not bound upon the libel in question to have proved the prescription their plea states, is an equally safe statement, and if it were made with knowledge of

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the law, an equally candid one ; for it makes parcel of the prescription what is legally no part, viz. the privity, knowledge, and consent of the parish to the exclusive use of the pews. If the pews were from time immemorial appurtenant to the inn, and the principal and ancients had from time immemorial the exclusive use and enjoyment, their right would be the same whether the parish knew of the exclusive use and enjoyment, and consented to it or not. It is, therefore, perfectly true, that according to the course of proceeding in the court christian the principal and ancients would not have been bound to prove the prescription, *with that privity and consent as parcel*, because they would not have been bound to prove it by the course of proceeding in any court whatever. These are the answers to which the defendant's arguments and pleadings are open ; and, upon the grounds we have stated, we are of opinion that there ought to be judgment for the plaintiff.

Judgment for the plaintiff. (a)

LITLEDALE J. was absent on the winter circuit during the argument of this case.

(a) In *Easter* term, the same question came on for argument in *Baker v. Baines* ; the pleadings being precisely the same, except that the latter cause related to the society of Barnard's Inn.

W. E. Taunton prayed to be heard against the demurrer, inasmuch as the former case had not been decided by the whole Court ; and in the judgment delivered in that case, it was assumed that the immemorial possession of the pews had been put in issue in the spiritual court, although not by any plea or by the personal answer, which assumption, he said, was unfounded ; but

ABBOTT C. J. said, that the two Judges who were not present at the decision of the former case, had read the arguments and judgment which were then delivered, and perfectly coincided with the opinion then expressed by the Court, and that even if the assumption as to the course of proceeding in the court below were erroneous, it was perfectly immaterial, and could not have the effect of altering the judgment.

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ASSUMPSIT. The declaration contained the usual money counts. Plea, general issue. At the trial before *Best J.* at the *Huntingdonshire* Summer assizes, 1822, a verdict was found for the plaintiff with 77*l.* 16*s.* 9*d.* damages, and liberty was reserved to the defendant to move to enter a nonsuit. The defendant having moved accordingly, this court directed the following case to be stated :

The plaintiffs were the proprietors of the *Rockingham* public stage coach, travelling from *London* to *Leeds*, and from *Leeds* to *London*. The defendant was clerk to the trustees appointed under a local turnpike act, passed in 38 *Geo. 3.*, entitled "An act for repairing the roads from the stone pillar upon *Alconbury Hill* to *Wansford Bridge*, and from *Norman Cross* to the south end of *Peterborough Bridge*, all in the county of *Huntingdon*." By this act a toll of 1*s.* 6*d.* was imposed upon every coach, berlin, &c., drawn by more than two horses passing through certain toll-gates continued or to be erected on the roads mentioned in the act, and certain other tolls were imposed upon horses not drawing, and upon cattle; and by the same act it was also provided that all and every person or persons having once paid the tolls so made payable as aforesaid for his and their carriage, horses, and cattle,

By a turnpike act, certain tolls were imposed upon carriages drawn by horses, another toll upon horses not drawing, and other tolls upon oxen, &c.

There was a proviso that all persons having once paid the toll for their carriages, horses, and cattle, returning the same day with the same carriages, horses, and cattle, should pass toll free.

By a subsequent act, reciting that it was expedient to increase the tolls, the provisions in the former act, except with certain alterations, were re-enacted. One of the alterations was, that the former tolls should cease, and that instead thereof there should be paid for every horse or beast of draught draw-

ing a carriage sixpence. After the passing of the latter act, four horses drawing a stage coach passed through one of the toll gates in the morning, and the same four horses, drawing a different stage coach, belonging to the same proprietor, repassed through the same gate in the evening: Held, that no second toll was payable.

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having occasion to return, and actually returning before twelve o'clock at night next after having paid such toll, with the same carriage, horses, and cattle, should have liberty to pass toll free through such gates as he had before paid toll at, and should not be obliged to pay toll a second time on one day. By an act of the 59 G. 3. the said therein recited act of the 38 G. 3., and all and every the clauses, powers, provisions, matters, and things therein contained, (except such parts thereof as were thereby varied, altered, or repealed) were continued in full force and effect to all intents and purposes as if the same were repeated and re-enacted in the body of that act, but subject nevertheless to the alterations and amendments thereby made. By the 59 G. 3. all the tolls imposed by the 38 G. 3. were repealed, and instead thereof, as to the tolls on carriages, a toll of 6*d.* for every horse drawing a coach, berlin, &c., was imposed, and it was further enacted, that no person or persons should be liable to the payment of toll at more than two bars on the said roads, on passing between *Alconbury Hill* and *Wansford Bridge* in any one day from the 1st *January* 1821 to the 7th *February* 1822.

The *Rockingham* coach going from *London* to *Leeds*, having changed horses at *Stilton*, passed through the *Wansford* toll-gate at 8 o'clock at night, when a toll of 2*s.* (i. e. of 6*d.* for each horse) was paid by the coachman. The same horses for which the toll had been so paid returned with the *Rockingham* coach going from *Leeds* to *London*, being a different coach, with different passengers, and passed through the said gate at 11 o'clock, and got back to *Stilton* before 12 o'clock the same night. Upon reaching *Wansford Gate* the second time, a second toll of 2*s.* was demanded by

by the collector appointed by the trustees, because, although the coachman and horses were the same, the coach and passengers were different. The gate being closed, and the coach prevented from proceeding, the coachman (protesting against the collector's right to exact it,) paid such second toll for the above mentioned period of time. In the like manner the *Rockingham* coach going from *Leeds* to *London*, changed horses at *Stilton*, and passed through the *Sawtry* toll-gate at one o'clock in the morning, when a toll of 2s. was paid. The same horses returned with the coach going from *London* to *Leeds*, being a different coach with different passengers, at 6 o'clock in the same morning, when a second toll was demanded, and paid under a similar protest for the same period of time. The toll-gates at *Wansford* and *Sawtry* are both situated on the line of road between *Alconbury Hill* and *Wansford Bridge*, and there are no other gates within the same distance.

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The case was argued, at the sittings after *Easter* term 1825, by *Dover* for the plaintiffs, and *Storks* for the defendant. The argument and the authorities cited are so fully commented on by the Court, in their judgment, that it is unnecessary to state them here.

Cur. adv. vult.

BAYLEY J. This was an action brought by the plaintiff to recover back tolls paid by him, between *January* 1821 and *February* 1822, for a coach called the *Rockingham*, which runs from *London* to *Leeds*, passing through two toll-bars on the *North* road at *Sawtry* and *Wansford*, and the question was, whether two tolls were payable at each on the same day, or only one. The same

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same horses passed each time through the respective gates, but with different coaches. Each coach belonged to the plaintiff. The plaintiff insisted that he was entitled to exemption the second time of passing, if the horses were the same, though the coaches were different. The case depends upon two acts of parliament, the 38 Geo. 3. and the 59 Geo. 3. The 38 Geo. 3. imposes tolls, first, upon coaches, chaises, &c., if drawn with more than two horses 1s. 6d., with two 9d., or with only one 4½d.; second, waggons, &c., according to the breadth of the wheels, and the number of horses, mules, or oxen by which they are drawn; third, upon horses, mules, or asses, not drawing; fourth and fifth, upon oxen, neat cattle, calves, hogs, sheep, or lambs, at the rate of so much per score. There is an exemption, providing that all persons having once paid the toll for their carriages, horses, and cattle, having occasion to return, and actually returning before 12 at night with the same carriages, horses, and cattle, shall pass toll free. The 59 Geo. 3. recites that the money borrowed cannot be repaid, nor the roads kept in order, unless the term of 38 G. 3. is further continued, *the existing tolls increased*, and some of the provisions altered and enlarged; and it continues the provisions in the former act (except such parts as it alters) in as full, ample, and beneficial a manner, as if they were re-enacted. One of the alterations is, that the former tolls shall cease, and that instead thereof there shall be paid for every horse or beast of draught drawing a coach, &c., 6d., drawing a waggon, &c., 3d., horse, mule, or ass not drawing 1½d., score of oxen, &c., double the former rates, carriage fixed behind another, if four wheeled, 1s., if two wheeled 6d. This act contains a new exemption clause,
but

but nothing applicable to the present case. The question, therefore, is, whether the exemption clause in 38 G. 3., applying the language of that clause to the tolls payable under the 59 G. 3., extends to the case in question, that of the same horses drawing a different coach. According to the mode in which the toll was imposed by the 38 G. 3. upon the carriage, not upon the horses drawing it, the new coach in this case (in conformity with the opinion of the Court in *Williams v. Sangar* (a) and *Waterhouse v. Keen* (b),) would be liable. According to the mode in which the toll is imposed by the 59 G. 3. upon the horses, not upon the carriage, the new coach in this case (in conformity with *Norris v. Poate* (c),) would not be liable, but would be exempt. The point for consideration, therefore, is, whether the existence of the liability, according to the mode in which the toll is imposed in the 38 G. 3., will extend that liability to the mode in which the toll is imposed by the 59 G. 3. Had the toll been imposed by the 38 G. 3. in the mode in which it is imposed by the 59 G. 3. the exemption in question would certainly have existed. When the 59 G. 3. varies the mode of imposing the toll, has it not the same effect as if the substituted mode introduced into the 59 G. 3. had been inserted in the 38 G. 3.? and that mode would have extended the exemption to the second toll. The variation in the mode is inserted in the 59 G. 3., either at the instance of the framer of the bill, or by the discretion of the legislature; but if it were introduced by the former, the legislature has acceded to it; if it were insisted on by the legislature, the legislature has *required* it; but in either case

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(a) 10 East, 66.

(b) 4 B. & C. 200.

(c) 5 Bing. 41.

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there is a sanctioned variation in the mode. And if the mode is authoritatively varied, who can say that the consequences of that variation are not to follow? It may be a hardship upon those to whom the 38 G. 3. gave an exemption, that that exemption was not continued by the 59 G. 3. But they should have attended to the continuance of that exemption; they would be aware, if they paid proper attention to the subject, that the 38 G. 3. was about expiring, and that some new provision must be forthcoming, and they should have used their endeavours to continue in the new act the same mode of imposing the tolls as exempted them under the old act. They either neglected to do so, or their endeavours were unsuccessful, but the result is, in either case, the same. The previous mode is not continued. A new mode is substituted, and does not the substitution of the new mode supersede, with all its consequences, the old? *Gray v. Shilling (a)* is an authority in point that it does, and without any authority upon the point, a variation in the mode implies a change in the intention. Had it been intended to continue the old system, the use of the old language, and the continuance of the old mode, would naturally have been expected. Where new language is introduced, and a new mode adopted, it must be supposed a new system was intended. We are, therefore, of opinion that we must construe the exemption clause in the 38 G. 3. with reference to the new mode of imposing the toll, provided for by the 59 G. 3., as if that had been originally the mode prescribed by the 38 G. 3., and, consequently, that the defendant wrongfully took the toll in question. And

(a) 1 *Drod. & B.* 30.

this

this opinion will produce an uniformity of decision, according to the language of each act, whether it applies to an act where there has previously been no turnpike, or to one where a turnpike with its tolls and toll regulations have previously existed.

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Postea to the plaintiff.

JACKSON *against* CURWEN.

DECLARATION stated that a certain toll-gate, situate in the county of *Cumberland*, standing upon and across a certain public highway in the county aforesaid, was a gate erected by virtue of a certain act of parliament passed in the 46th year of his late majesty King *George* the Third, intituled "An act for more effectually improving the roads leading to and from the port, harbour, and town of *Whitehaven*, in the county of *Cumberland*;" and that the plaintiff, after the making and passing of the act, to wit, on the 11th day of *April* 1825, in the county aforesaid, was lawfully possessed of four horses, which then and there drew a certain coach of the plaintiff in and along the said highway, and through the said toll-gate, and for the said horses so passing through the said toll-gate as aforesaid, the plaintiff then and there paid to the defendant, being the toll-gate keeper appointed to collect the tolls at the said gate, the toll by him demanded and due in that behalf, by force of the statute aforesaid, and then and there obtained and received from the defendant, so being such

By a turnpike act, a certain toll was imposed upon every horse or other beast drawing any carriage, &c., a certain other toll upon every horse not drawing, and other tolls upon every drove of oxen, &c. There was a proviso that no collector should take more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle passing once and repassing once in the same day through the same or any of the gates on the said roads, such person producing a ticket denoting that such toll had been paid on that day for or in respect of such horse, beast, or other cattle: Held, that a second toll was not payable in respect of the same horses passing once and repassing once in the same day, but drawing a different carriage belonging to the same proprietor.

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toll-gate keeper, a proper and sufficient ticket, denoting the due payment of such toll; and that afterwards, and before 12 o'clock at night of the same day, in the year last aforesaid, in the county aforesaid, the same horses were lawfully drawing another and different coach of the plaintiff in and along the said highway, and near to the said toll-gate, for the purpose of passing through the same free of toll; and for that purpose the plaintiff then and there presented and shewed to the defendant the said ticket, and demanded permission of the defendant, as such toll-gate keeper as aforesaid, to pass through the said gate with the said horses and the said last-mentioned coach free from toll, according to the form and effect of the statute aforesaid, yet the defendant, well knowing the premises, but wrongfully and maliciously contriving and intending to injure and aggrieve the plaintiff in that respect, did not, nor would suffer or permit the said horses with the said last-mentioned coach so to pass through the said toll-gate free from toll, but wholly refused so to do; and, on the contrary thereof, wrongfully and falsely pretended that a toll of a certain sum of money, that is to say, a toll of 2s., was due and payable to the defendant under and by virtue of the statute aforesaid, and injuriously fastened the said gate, and kept the same fastened for a long space of time, to wit, for the space of one hour, and thereby wrongfully stopped and detained the said horses and the said last-mentioned coach, and hindered and prevented the same from passing through the said gate, along the said highway, until the plaintiff paid to the defendant the said sum of money so pretended to be due and payable as aforesaid, contrary to the form and effect

effect of the statute aforesaid. There was also a count in trover. Demurrer and joinder. (a)

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This case was argued by *F. Pollock* for the plaintiff, and *Patteson* for the defendant.

BAYLEY J. It is an established rule that where the toll is imposed upon carriages drawn by horses, and there is a clause of exemption for all persons re-passing on the same day with the same horses and carriage, or with the same horses or carriage, and the same carriage returns the same day drawn by different horses, no second toll is payable, *Williams v. Sangar* (b), *Water-*

(a) By sect. 17. of the act the following tolls were imposed :

" For every horse or other beast of draught drawing any coach, sociable, &c., the sum of sixpence :

" For every horse, mare, gelding, mule, or ass, laden or unladen, and not drawing, the sum of two-pence :

" For every drove of oxen, cows, or neat cattle, the sum of one shilling and sixpence per score, and so in proportion for any greater or less number : and

" For every drove of calves, swine, sheep, or lambs, the sum of ten-pence per score, and so in proportion for any greater or less number."

Sect. 21. enacted, " That nothing therein contained should be construed to enable any collector of the said tolls to demand or take any more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle, passing once and re-passing once in the same day (such day to be computed from twelve o'clock at night to twelve o'clock in the succeeding night), through the same or any other gate or gates on any of the said roads, all and every such person and persons producing a ticket denoting that such toll has been paid on that day for or in respect of such horse, beast, or other cattle on the said roads."

Sect. 28. enacted, " That it shall be lawful to the trustees from time to time to compound with any person or persons for any period of time, not exceeding one year, for any horses, beasts, or cattle passing on the said roads, or any part or parts thereof, for all or any of the tolls to be paid in respect of such horses, beasts, or other cattle."

(b) 10 East, 66.

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house v. Keen (a). And where the toll is imposed upon the horses drawing the carriage, with a similar clause of exemption, no second toll is payable if the same horses return with a different carriage, *Gray v. Shilling* (b). In this case a toll of 6*d.* is imposed upon horses drawing, and upon horses not drawing 2*d.*, and therefore, according to the above rule, in an ordinary case no second toll would be payable in respect of the same horses returning with a different carriage. Unless, therefore, it appears clearly from the exempting clause in this act of parliament to have been the intention of the legislature that it should apply to those cases only where the same horses returned drawing the same carriage, the general rule of construction applicable to these acts of parliament ought to prevail, and then a second toll would not be payable. The word *carriage* is introduced as a subject of toll for the first time in the exempting clause. It enacts, that the collector shall not take more than one toll for the same *carriage*, horses, beast, or other cattle passing once, and re-passing once in the same day. From that part of the clause, taken by itself, it would appear to have been the intention of the legislature that it should apply to cases only where the same horses re-passed drawing the same carriage. The carriage, therefore, is contemplated as a subject matter of toll. But then the clause goes on to annex as a condition precedent to any exemption, that the party claiming it shall produce a ticket denoting that such toll has been paid on that day for or in respect of such horse, beast, or other cattle. The ticket, therefore, which is to be produced

(a) 4 B. & C. 200.

(b) 2 Brod. & B. 30.

to the collector in order to exempt a party from the payment of a second toll, is to denote only that the toll has been paid in respect of the horse, and not in respect of the carriage. But still if the former part of the clause be construed literally, the production of such ticket will not entitle a party to exemption from the toll unless he re-passes with the same horses drawing the same carriage. From the latter part of the clause it appears that the legislature contemplated a toll upon horses only. From the former part, that they contemplated a toll in respect of the carriage. Taking the whole of the clause together, it seems very doubtful whether it was intended to be confined to cases only where the same persons returned with the same horses drawing the same carriage. There is another clause which shews that the objects of the toll were the horses, beasts, and cattle, and not the carriage. By section 28. the trustees are enabled to compound with any person for any horses, beasts, or cattle passing on the roads, for any of the tolls to be paid in respect of the same. Considering, therefore, that the toll was originally imposed upon the horses drawing, and not upon the carriage, and that it does not appear clearly that the legislature meant to confine the operation of the exempting clause to cases only where the same horses returned with the same carriage, we think that the general rule of construction applicable to these acts of parliament ought to prevail, and, consequently, that no second toll was payable for and in respect of the same horses returning the same day with a *different* carriage, the property of the same person. But as it does not sufficiently appear upon the face of this declaration that

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the plaintiff passed and re-passed only once, we think the defendant is entitled to judgment. Under the circumstances, however, the plaintiff may be allowed to amend upon payment of costs.

The following case upon the same subject was argued at the Sittings in Banc. after this term, by *Cross* Serjt. for the plaintiff and *Coltingham* for the defendant.

CHAMBERS and Others *against* WILLIAMS.

Assumpsit for money had and received. The plaintiffs were the proprietors of two stage coaches, one of which travelled daily between *Birmingham* and *Liverpool*, and the other travelled daily between *Liverpool* and *Birmingham*. The defendant was clerk to the trustees under a turnpike road act. By that act the trustees were authorised to take at the toll gates or toll bars erected by virtue of that act, on every day, the following tolls: "For every horse, mule, or other beast, drawing any coach, sociable, berlin, &c., or other such like carriage, the sum of sixpence; for every horse, mule, or other beast, drawing any waggon, wain, cart, dray, or other such like carriage, the sum of sixpence; for every four wheeled carriage fixed to any waggon, wain, dray, cart, or other carriage, the sum of nine-pence; for every two wheeled carriage so fixed, the sum of sixpence; for every horse or mule drawing any other carriage, of whatever name or description, the sum of sixpence; for every ox, steer, gale, or bull, drawing any carriage, of whatever name or description, the sum of four-pence; for every ass drawing any carriage, of whatever name or description, the sum of two-pence; for every horse, mule, or ass, laden or unladen, and not drawing, the sum of one-penny; for every drove of oxen, cows, or neat cattle, the sum of ten-pence per score, and so in proportion for any greater or less number; and for every drove of calves, hogs, sheep, or lambs, the sum of five-pence per score, and so in proportion for any greater or less number." And the said respective tolls were subject to the restrictions in that act contained, to be demanded and taken before any horse, mule, or other beast, coach, waggon, cart, or other carriage whatsoever, or drove of oxen or neat cattle, calves, sheep, lambs, or swine, should be permitted to pass through any toll gate, erected or to be erected, or continued upon the said road by virtue of that act; and upon payment of any of the said tolls, the collector or receiver was thereby required to deliver gratis to the person paying such toll a note or ticket denoting such payment, on which note or ticket should be named and specified the several toll gates freed by such payment. Sect. 28. enacted, that all and every person and persons having paid the

the said tolls, on producing' a ticket from the collector denoting such payment, should be permitted to pass and repass once in the same day, through the toll gates or toll bars mentioned in such note or ticket, with the same horses, mules, or other beasts, coach, waggon, cart, or other carriage, or drove of oxen or neat cattle, calves, sheep, lambs, or swine, without being subject or liable to any additional toll for so doing; and no person should be permitted to pass a subsequent time in any one day with the same cattle through any of the toll gates or toll bars aforesaid until he should pay, for every such subsequent time of passing through such toll gates or toll bars the same day, the tolls by that act authorised to be taken. Four of the plaintiffs' horses drawing one of the said stage coaches on its way from *Birmingham* to *Liverpool*, conveying passengers and parcels for hire, driven by the plaintiffs' coachman, passed about three o'clock in the afternoon of each and every day through one of the gates erected by virtue of the act, and about nine o'clock in the evening of each and every of the same; the same four horses, driven by the same coachman, repassed through the same gate, every evening at nine o'clock, drawing the other of the aforesaid stage coaches in its way from *Liverpool* to *Birmingham*, conveying other passengers and parcels for hire. The collector at the said gate demanded a further or second toll duty of sixpence for each of the said four horses upon their repassing through such gate, which demand the plaintiffs have resisted, but been compelled to pay, and have accordingly paid the money so demanded by the collector at the said gate, amounting to 13*l.* 16*s.*, after protesting against the same.

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Per Curiam. In this case the tolls are imposed upon the horses drawing carriages, except where a carriage is fixed to a waggon, and different tolls are imposed upon horses drawing different descriptions of carriages, and there is one general clause of exemption applicable to all the cases contained in the enacting clause. In this clause of exemption there is a great want of precision, but inasmuch as the toll claimed in this case must, if due at all, be in respect of the horses drawing, according to the general rule of construction applicable to these acts of parliament, no second toll would be payable in respect of the same horses returning with a different carriage. If the framers of this act meant to exact a second toll in such a case, it was their duty to express that intention in plain and unambiguous language. By the clause of exemption, it seems that the legislature contemplated a toll upon carriages and not upon animals, but in fact the toll imposed, except in two instances, was a toll upon animals, and the exemption clause must be construed together with the enacting clause. Taking the two clauses together, and adverting to the rule of construction which has been applied to similar acts of parliament, where the toll has been imposed on the animal drawing the carriage, and where there is a general clause of exemption applicable both to the horse and carriage, we think it very doubtful whether the legislature meant to impose a second toll where the

same

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same horse returns the same day with a different carriage, and that being so, we ought to incline to that construction which will have the effect of relieving the subject from a burden. *Loaring v. Stone* (a) is distinguishable, because the word "carriage" must have been wholly rejected in the clause unless a second toll was due. But in this case, a toll is in two instances imposed on the carriage, and therefore the word "carriage" in the exempting clause may have effect as applicable to those instances where the toll is imposed on the carriage.

Judgment for the plaintiffs.

(a) 2 B. & C. 515.

PEARCE against WHALE.

In assumpsit for work and labor as an attorney, it was proved that the plaintiff had been retained in the year 1824 to conduct a suit for the defendant in the Court of Common Pleas, and that the bill of costs was incurred in that suit. It appeared that the plaintiff had not taken out any certificate during the year 1814 and four subsequent years. It was proved that he had been admitted an attorney of the Court of King's

ASSUMPSIT for work and labour as an attorney.

Plea, non-assumpsit. At the trial before *Graham B.* at the Spring assizes for the county of *Essex*, 1825, it appeared that in the year 1824, the plaintiff had been retained by the defendant to conduct a suit for him in the Court of Common Pleas, and that the amount of the bill of costs in the course of the suit was 28*l*. It was proved on the part of the defendant that the plaintiff had not taken out any certificate during the years 1814 and 1815, 1818, 1819, 1820. He was admitted an attorney of the Court of King's Bench in 1792, and had not been re-admitted an attorney of that court. But it was not proved that he had not been re-admitted an attorney of the Court of Common Pleas. It was contended on the part of the defendant that the plaintiff having omitted to take out his certificate for Bench in 1792, and had not since that time been re-admitted an attorney of that court, but there was no proof that he had not been re-admitted in the Court of C. P.: Held, that the plaintiff's having acted as an attorney of the Court of C. P. in 1824, was prima facie evidence that he was at that time an attorney of that court, and that it then lay upon the defendant to shew that at the time when the bill of costs was incurred the plaintiff was not an attorney of the Court of C. P., by shewing that he had not been re-admitted in that court.

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more than one year, his original admission had become null and void by the 37 G. 2. c. 90. s. 31. (a) That it lay upon him to shew that he had been re-admitted in the Court of Common Pleas. On the other hand it was contended by the plaintiff that as he had given *prima facie* evidence that he was an attorney of the Court of Common Pleas at the time when the business was done, by having acted in that character, it was incumbent on the defendant to shew that he, the plaintiff, had never been re-admitted an attorney of that court. The learned judge reserved the point, and a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit; a rule nisi having been obtained for that purpose upon the objection taken at the trial, the case was argued by *Broderick* for the plaintiff and *Abraham* for the defendant.

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 PRACTICE
 against
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Per Curiam. In an action by an attorney for slandering him in his profession, it is sufficient for him to prove that he has acted as an attorney of the Court of which he is alleged to be an attorney, and if the defendant's words assume that the plaintiff is an attorney, it operates as an admission that he is so, and supersedes

(a) By that clause it is enacted, "that every person admitted, sworn, enrolled, or registered in any of the courts, who shall neglect to obtain his certificate for the space of one whole year, shall from thenceforth be incapable of practising in any of the courts by virtue of such admission, and the admission, &c. of such person in any of the said courts, shall be from thenceforth null and void; provided always that nothing hereinbefore contained shall be construed to prevent any of the said courts from re-admitting any such person on payment to the said commissioners of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money, by way of penalty, as the said court shall think fit to order and direct."

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the necessity of other proof, *Berryman v. Wise* (a). So, in an action for tithes, it is not necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes and acted as the incumbent is sufficient, *Bevan v. Williams* (b). Now in this case it was shewn that the plaintiff in 1824 acted as an attorney of the Court of Common Pleas, and that he was retained in that character by the defendant. That was *prima facie* evidence that he was at that time an attorney of that Court, and unless that *prima facie* evidence was rebutted by other evidence, the plaintiff was entitled to recover. It then lay upon the defendant to shew that at the time when the bill of costs was incurred, the plaintiff by acting as an attorney acted illegally. We think that the defendant did not shew that at that time the plaintiff was a person unlawfully acting as an attorney. The rule applies *omnia præsumentur rite esse acta*. The defendant proved that the plaintiff was admitted an attorney of the Court of King's Bench in 1792, and that he neglected for more than one year after that period to take out his certificate. It has been contended that his original admission thereby became void, and that he ceased to be an attorney, until he was re-admitted, and that it lay upon the plaintiff to prove a re-admission; but as the plaintiff had proved that he had acted as an attorney of the Court of Common Pleas in 1824, it must be presumed that he lawfully acted in that character in that Court, unless the contrary be proved. Now the defendant did prove that the plaintiff had not been re-admitted in the Court of King's Bench, but he failed in proving that he had not been re-admitted in the Court of Common

(a) 1 T. R. 366.

(b) 3 T. R. 635.

Pleas. We think after the plaintiff had made out his *prima facie* case, it was incumbent upon the defendant, in order to shew that the plaintiff at that time was not an attorney of the Court of Common Pleas, to prove, not only that he had ceased in the intervening period to take out his certificate, but that he had not been re-admitted an attorney of the Court of Common Pleas.

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against
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Rule discharged.

CLAYTON and Others *against* BURTENSHAW and
Another.

COVENANT for not paying for stock in trade, furniture, &c., in pursuance of the following agreement under seal: "Memorandum of agreement made and entered into this 25th day of *September* 1815; viz., That is to say, we, the undersigned *Henry, Richard, James, and Charles Burtenshaw*, in the county of *Sussex*, yeomen, do agree with Messrs. *Thomas Clayton, Henry Burtenshaw, and John Burtenshaw*, executors to the estate of the late *George Venall of Henfield* deceased, to take and hire of the said executors, for our son and nephew *Richard Burtenshaw*, all that house, shop, warehouse, and all appurtenances thereunto belonging, situated, lying, and being in the town and parish of *Henfield*, in the county of *Sussex* aforesaid, at the yearly rent of 35*l.* per annum, we paying all taxes, except the property tax. It is also by these presents further agreed that we will take all the stock in trade of grocery, linen

By an instrument under seal, *A.* agreed to take and hire of *B.* certain premises at a certain yearly rent, but no time was fixed for the commencement or determination of the interest. It was also agreed that *A.* should take at a valuation to be made on a future day, the fixtures, furniture, and stock in trade on the premises. The instrument had a stamp of 1*l.* 10*s.* impressed upon it: Held, that it was only an agreement for a lease, and that the stamp was not sufficient. Semble, It should have been a stamp of 1*l.* 15*s.*, the instrument being "a deed not otherwise charged" in the schedule to 55 *G. 3. c.* 184.

drapery,

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against
BURTENSRAW.

drapery, and haberdashery, and also all the fixtures and utensils in the shop and warehouse; and such part of the household furniture as we the undersigned shall think necessary for the use of our son and nephew *Richard Burtenshaw*, at a fair valuation, on the 11th day of *October* next coming; and for the consideration and amount of such stock, utensils, and household furniture, we do agree to pay or cause to be paid the sum of 1000*l.* in the manner hereinafter mentioned, that is to say, &c." This deed was executed by the two defendants only. The declaration alleged, that by a certain memorandum of agreement made, &c., the defendants *did agree with* the plaintiffs to take and hire of the plaintiffs all that house, &c., and it was also by the said agreement further agreed that the said defendants and *James Burtenshaw*, &c., *would take* the stock in trade at a fair valuation, &c. Plea, non est factum. At the trial before *Graham* Baron, at the *Sussex Lent* assizes, 1825; the instrument was produced in evidence, when it appeared to have a 30*s.* stamp. For the defendants it was objected that this stamp was insufficient, and the learned judge being of that opinion, the plaintiffs were nonsuited. In *Easter* term a rule nisi for setting aside the nonsuit was obtained, against which

Taddy Serjt. shewed cause. The nonsuit in this case was right. The instrument set out in the declaration is an agreement under seal. Now the stamp of 1*l.* imposed upon agreements by the 55 G. 3. c. 164. applies to agreements under hand only. No express mention is made of agreements under seal. This, therefore, must be considered either as a lease or deed. It is not a lease, there is no specific time or term for which the interest
in

in the premises is created. The only words upon which an argument on the other side can be founded are, "we do agree to take and hire for our son and nephew all that house, &c., at the yearly rent of 35*l*." In *Bac. Abr.*, tit. *Lease*, (K.) it is said "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it, *for such a determinate time*, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years," and in *Poole v. Bentley* (a) and *Doe d. Walker v. Groves* (b), words of agreement were held sufficient to make a present demise, but in each of those cases a determinate time for the duration of the interest was mentioned. In this case too the agreement for the future purchase of the fixtures and stock in trade shews that it was not intended to operate as a lease. But supposing it to be a lease, it is not a lease only, but also a transfer of goods. This rule was obtained on the authority of *Corder v. Drakeford* (c), but that case merely decided that the instrument being in law a lease, could not be read in evidence for want of a lease stamp, and did not decide that such an instrument need not have any but a lease stamp. If the stamp in this case were held to be sufficient, goods to any amount might be sold at a valuation, without paying an *ad valorem* stamp duty. It will be said that this is not a present sale of the goods; if so, neither is it a present demise, for it must receive the same construction as to the house and goods. At all events, therefore, whether it be construed as a lease and

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 CLAYTON
 against
 BURTONSHAW.
(a) 12 *East*, 168.(b) 15 *East*, 244.(c) 3 *Trunt.* 382.

1826.

CLAYTON
against
BURNESHAU.

conveyance of goods, or as an agreement for a lease and conveyance of goods, it does not come within the description of a lease, which by the 55 G. 3. c. 184. is subject to a stamp duty of 1*l.* 10*s.* ; but is " a deed not otherwise charged," and the stamp upon such an instrument ought to be 1*l.* 15*s.*

Marryat and *Chitty* contra. It is true that a conveyance of goods under seal must have an ad valorem stamp, but this is not such an instrument. It conveys no goods in particular, but those which the parties might afterwards think fit to take at a price to be afterwards affixed ; and upon that the amount of duty would depend. As to the goods, therefore, it is clear that this was merely a preliminary agreement. Besides, these goods were only taken as incident to the house, and according to *Corder v. Drakeford*, a stamp for the principal suffices for the accessory also. The interest in the premises would commence on the execution of the instrument, and no time being fixed for its duration, but a yearly rent being payable, it would operate as a lease for a year. If this objection be held good, it will be fatal to most leases of shops and farms, for there are very few which do not contain some stipulation as to taking certain things at a valuation, either at the commencement or expiration of the term. It does not necessarily follow that a deed must have two stamps, because it may operate in two different ways, *Leeds v. Burrow* (a). The courts have taken into consideration the apparent intent of the parties, and have held the stamp sufficient where the whole is one transaction, and

(a) 12 *East*, 1.

no fraud is intended, *Boase v. Jackson* (a). [Bayley J. This is not a lease only, if indeed it be a lease at all; and it seems difficult to say that it is, for there are no words to bind the lessor, nor does he appear to have executed the instrument.] It may be considered as a counterpart; and it is never necessary for a lessor to shew that he executed; it is sufficient for him to produce a counterpart executed by the tenant.

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CLAYTON
against
BURTONSHAW.

BAYLEY J. I am clearly of opinion that the nonsuit in this case was right. The statute 55 G. 3. c. 184. sched. part 1. requires a specific stamp upon leases. If the instrument in question were a lease, and a lease only, the 1l. 10s. stamp which it bears would be sufficient. If it were a mere contract for the sale of goods, and not under seal, no stamp at all would be necessary; but the exemption does not extend to such contracts under seal. If the instrument were a lease and something more, then a further stamp might be necessary; but although I have formed an opinion upon that point, it is not necessary to express it, for I am of opinion that the instrument is not a lease, and that being so, it falls within the description in the sched. part 1. "a deed of any kind whatever not otherwise charged," and a stamp of 1l. 15s. is necessary. In judging whether this be a lease or not, let us first look at the declaration. The plaintiff does not describe it as a lease, there are no words of demise, the language as there set out is that of the defendants alone. Looking at the instrument itself, I am satisfied that great injustice might be done by holding it to be a lease. Was it the intention of the

(a) 3 B. & B. 185.

parties

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parties that it should operate as a present demise? I cannot persuade myself that the defendants ever consented so to consider it. Non constat when the interest was to commence, nor how long it was to continue. Now it is hardly to be supposed that a man would agree to buy the fixtures and stock in trade on the premises without having some certainty as to the length of time during which he would have a right to occupy the premises, and carry on his business there. It has been said that the interest would commence from the execution of the instrument, but it is clear that the property in the goods could not vest at that time. Suppose them to have been afterward destroyed, could it be contended that the defendants would be bound to take the premises without having the benefit of the furniture and stock in trade? It would be very difficult to establish such a proposition. I am, therefore, of opinion that this instrument operated as an agreement for a lease, as alleged in the declaration, and that it comes within the description at the end of the title "deed" in the sched. part 1. to the 55 G. 3. c. 184., and was therefore liable to a stamp duty of 1*l.* 15*s.*

HOLROYD J. I am of the same opinion. This deed is not, as described in the declaration, or as given in evidence, a lease. It does not contain any words binding the party who was to demise. Even if another part of the agreement containing such words had been given in evidence, it would not have amounted to a present demise, and would not have come within that description of lease which by the last stamp act is required to have a stamp of 1*l.* 10*s.* It was therefore necessary to have
a stamp

a stamp of 1*l*. 15*s*., the instrument being a deed not otherwise charged in the schedule.

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LITTLEDALE J. It appears to me that the nonsuit in this case was right, whether the instrument in question be a lease or agreement. If it be a lease, still I think it clear that the stamp was insufficient. The fixtures might be accessary to the house, but the goods were not so, and were not the subject matter of the demise. Now the words of the statute requiring certain stamps upon leases apply only to that which is let. The question, therefore, seems free from doubt, for besides the words of demise or agreement to demise, this instrument contains a contract by deed for the sale of goods. Such a contract is not within the exception in favour of bargains for the sale of goods, and the deed not being otherwise charged was liable to a duty of 1*l*. 15*s*. It is said that inconvenience will be produced by such a decision. Without enquiring whether that be so or not, it suffices to say that the consequence cannot alter the law.

The Court were about to discharge the rule, but as the instrument had been impressed with a stamp of 1*l*. 10*s*. by the advice of the officers of the stamp-office, the rule was made absolute upon payment of costs, as between attorney and client.

1826.

DOE on the Demise of ISAAC WINTER *against*
PERRATT.

DOE on the several Demises of CATHERINE
VINEY, THOMAS VINEY, and THOMAS GREEN-
SLADE *against* PERRATT.

GOODTITLE on the several Demises of JOHN
SLADE and JOHN STAINES WEBB *against*
PERRATT.

Testator, after giving his T. estate to certain persons for life, devised it "to J. C., or his male heir, if any, free land, not to be mortgaged or sold; and if no male heir lawfully begotten by the said J. C., then the above lands to fall to the first male heir of the branch of my uncle R. C.'s family, yielding and paying unto such of the daughters of the aforesaid R. C. which shall be then living, the sum of 100*l.* each,

at the time of the taking possession of the aforesaid estate." At the time when the will was made R. C. was dead, having left five daughters, all married; the eldest had several daughters, but no son; each of the others had sons; and all these persons were known to the testator. J. C. died without issue, and the fourth daughter of R. C. died (before any of her sisters, and during the continuance of the life estates given by the will), leaving a son: Held, that her son was entitled to the T. estate, as being the first male heir of the branch of R. C.'s family, per *Holroyd and Littledale J.* Bayley J. dissentiente.

THESE three ejectments were brought by several persons to recover the same lands in the county of *Somerset*. In each a special verdict was found, in substance as follows:

On the 16th day of *March* A.D. 1786, *Emanuel Chilcott* was seised in his demesne as of fee of certain tenements known by the name of the *Truckwell* estate, being the tenements in the within declaration mentioned; and being so seised thereof, afterwards, to wit, on the day and year aforesaid, duly made and published his last will and testament in writing, bearing date, &c. and signed by him the said *Emanuel Chilcott*, and attested and subscribed in his presence by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things,

devised

devised as follows: " I give unto *John Chilcott*, my kinsman, living in *London*, 100*l.*, to be paid in one year after my decease; (several small legacies were then bequeathed); also I give unto *Ann White*, my sister-in-law, the sum of 20*l.*, and the income of *Burge's* cottage, and her living in it, if she thinks proper, during her natural life; also I give unto *Eleanor White* 100*l.*, and half of *Truckwell* estate during her natural life; also I give unto *William Burge*, my servant man, 5*l.* All the rest and residue of my goods, chattels, rights, credits, personal and testamentary estate, and also my lands, tenements, and hereditaments, I give, devise, and bequeath unto *Elizabeth Chilcott*, my dearly beloved wife, during her natural life, whom I make my whole and sole executrix. And I do allow her the said *Elizabeth Chilcott*, to give what she thinks proper of her said effects to her sisters *Eleanor White* and *Ann White*, during their natural lives. And after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Eleanor White*, and *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell* estate to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any, free land not to be sold nor mortgaged on any account whatsoever, but to remain in the *Chilcott's* family for land of inheritance, with two cottages, garden, and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Witcombe*, free land. And if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hancrick* farm, yielding and paying unto such of the daughters of

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DOX dem.
WINTER
against
FERRATT.

1826.

DOX dem.
WINTER.
against
PERBATE.

the aforesaid *Richard Chilcott* which shall be then living the sum of 100*l.* each at the time of the taking possession of the aforesaid estates." *Emanuel Chilcott*, on the 24th day of *May* A.D. 1787, died so seised of the said tenements, with the appurtenances, without revoking or altering his said will, and without issue, leaving the said *Elizabeth Chilcott*, his widow, and the said *Ann White* and *Eleanor White* him surviving; whereupon and whereby the said *Eleanor White* became and was seised of one moiety of the said tenements, called *Truckwell* estate, with the appurtenances, in her demesne as of freehold, for and during the term of her natural life; and the said *Elizabeth Chilcott* became and was seised of the other moiety of the said tenements, with the appurtenances, in her demesne as of freehold for and during the term of her natural life. *Ann White* died on the 9th day of *April* A.D. 1791, leaving the said *Elizabeth Chilcott* and *Eleanor White* her surviving; and on the 23d day of *April* 1792, *Elizabeth Chilcott* duly made and published her last will and testament in writing, bearing date the day and year last aforesaid, and signed by her the said *Elizabeth Chilcott*, and attested and subscribed in her presence by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things devised, and in pursuance of all and every power and powers enabling her in that behalf, gave and devised all those the said tenements comprized in the said *Emanuel Chilcott's* will, over which she had any power of disposition, to her sister *Eleanor White*, and her assigns, for and during the term of her natural life. On the 25th day of *December* 1795, *Elizabeth Chilcott* died so
seised

seised of the last mentioned moiety of the said tenements called *Truckwell* estate, with the appurtenances, without revoking or altering her said will; whereupon and whereby the said *Eleanor White* became and was seised of the entire of the said tenements, with the appurtenances, in her demesne as of freehold for and during the term of her natural life; and on the 14th day of *July* 1820, *Eleanor White* died so seised of the said tenements, with the appurtenances. *John Chilcott*, in the will of *Emanuel Chilcott* mentioned, (which said *John Chilcott* was the heir at law of the said *Emanuel Chilcott*,) in the year of our Lord 1765, intermarried with one *A. B.*, and afterwards, and in the life-time of the said *Eleanor White*, in the month of *December* 1808, died, without ever having had any heir male by him lawfully begotten, and without having levied a fine or suffered a recovery of the tenements aforesaid, with the appurtenances, or any part thereof; but the said *John Chilcott* had issue, one *Sarah Chilcott*, his only daughter, and in the year our Lord 1789, the said *Sarah Chilcott* intermarried with one *Thomas Webb*, by whom she had issue one *John Chilcott Webb*, her only son; and on the 4th day of *April* 1810, she the said *Sarah Webb* died; whereupon and whereby the said *John Chilcott Webb* became and was the heir at law of the said *Emanuel Chilcott*. *John Chilcott Webb*, after the death of his said mother *Sarah Webb*, to wit, on the 13th day of *August* 1814, by a certain indenture bearing date the day and year last aforesaid, and made between the said *John Chilcott Webb* and *Louisa* his wife, of the one part, and *William Gray*, late of *Crewkerne*, in the county *Somerset*, esquire, since deceased, of the other part, for the con-

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Don dem.
Writen
against
Peasant.

1826.

Dox dem.
WINTER
against
PERRATT.

siderations therein mentioned, demised the said tenements called *Truckwell* estate, with the appurtenances, to the said *William Gray*, his executors, administrators, and assigns, for the term of 1000 years; and it was by the said indenture declared that a certain fine sur cognuzance de droit come ceo, &c., with proclamations levied of the said premises by the said *John Chilcott Webb* and *Louisa* his wife, should enure to and to the use of the said *William Gray*, his executors, administrators, and assigns, during the said term of 1000 years, and subject thereto to the only proper use and behoof of the said *John Chilcott Webb*, his heirs and assigns for ever. The said *William Gray*, on the 21st day of *October* 1815, duly made and executed his will, and thereby, without specifically devising or bequeathing the said tenements, with the appurtenances, or any part thereof, after certain devises and bequests, devised and bequeathed all the residue of his real and personal estate to the said *John Slade*, his executors, administrators, and assigns, and appointed him sole executor of his said will, and the said *William Gray*, on the 13th day of *August* 1817, died without altering or revoking the same, and the said *John Slade*, on the 17th day of *December* 1817, duly proved the said will in the prerogative court of the Archbishop of *Canterbury*, and took upon himself the execution thereof, whereupon and whereby the said *John Slade*, after the death of the said *Eleanor White*, to wit, on the said 20th day of *July* 1820 aforesaid, entered into the said tenements claiming the same, and was possessed thereof as the law requires, and being so possessed thereof, he, the said *John Slade*, afterwards, to wit, on the said 1st day of *December* 1820 within
men-

mentioned, demised to the within mentioned *John Goodtitle*, &c. On the 22d day of *April* 1820 the said *John Chilcott Webb* died intestate, leaving the said *John Staines Webb* his only child and heir at law, whereupon and whereby the said *John Staines Webb*, after the death of the said *Eleanor White*, to wit, on the 20th day of *July*, in the year of our Lord 1820, entered into the said tenements, claiming the same, and was possessed thereof as the law required, and being so possessed thereof, he, the said *John Staines Webb*, afterwards, to wit, on the said 1st day of *December* 1820, within mentioned, demised the said tenements, with the appurtenances, to the said *John Goodtitle*, &c. In the lifetime of the said *Emanuel Chilcott*, on the 17th day of *March* 1780, the said *Richard Chilcott*, the uncle of the said *Emanuel Chilcott*, who lived at *Hancrick Farm*, in the said will of *Emanuel Chilcott* mentioned, died, without ever having had a son, leaving five daughters only, that is to say, *Mary*, who was born on the 9th day of *November* 1739; *Joan*, who was born on the 1st day of *January* 1741; *Sarah*, who was born on the 4th day of *December* 1744; *Betty*, who was born on the 25th day of *October* 1746; and *Agnes*, who was born on the 13th day of *February* 1749; and which said daughters were all living at the time of the making of the will of the said *Emanuel Chilcott*, and at the time of his death; and as well the said five daughters, as the several descendants of the said daughters respectively, hereinafter mentioned, who were born before the making of the said will of the said *Emanuel Chilcott*, were all well known to him at the time of making his said will. On the 6th day of *June* 1768 the said *Mary Chilcott*, the eldest daughter of the

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DOX done.
WINTER
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said *Richard Chilcott*, intermarried with one *George Bishop*, by whom she had issue four daughters only, and no other issue, that is to say, *Betty*, who was born on the 6th day of *August* 1769; *Ann*, who was born on the 11th day of *October* 1770; *Mary*, who was born on the 11th day of *January* 1772; and *Anna*, who was born on the 2d day of *October* 1781. *Mary Chilcott*, afterwards *Bishop*, in the life-time of the said *Eleanor White*, in the year of our Lord 1799, died. On the 1st day of *May* 1794 the said *Betty Bishop*, the eldest daughter of the said *Mary Bishop*, intermarried with *John Derham Perratt*, by whom she had issue, the within named defendant, *Matthew Perratt*, her eldest son, and heir at law, who was born on the 3d day of *March* 1795, and which said *Betty Perratt* and *Matthew Perratt* are still respectively living. On the 14th day of *May* 1762 the said *Joan Chilcott*, second daughter of the said *Richard Chilcott*, intermarried with one *Isaac Winter*, by whom she had issue, two sons, that is to say, *Thomas Chilcott Winter*, who was born on the 18th day of *February* 1763, and *Isaac Winter*, who was born on the 15th day of *July* 1770, both of whom were also well known to the testator; and afterwards and after the death of the said *Eleanor White*, to wit, on the 8th day of *November* 1820, she, the said *Joan Chilcott*, afterwards *Winter*, died. In the respective life-times of the said *Eleanor White* and the said *Joan Chilcott*, afterwards *Winter*, to wit, on the 30th day of *December* in the year of our Lord 1817, the said *Thomas Chilcott Winter* died, a bachelor and intestate, leaving the said *Isaac Winter*, his brother and heir at law, him surviving. On the 3d day of *April* 1769, the said *Sarah Chilcott*, the third daughter of the said
Richard

Richard Chilcott, intermarried with one *Samuel Parsons*, by whom she had issue, two sons, that is to say, *James Parsons*, who was born on the 3d day of *October* 1771, and *John Parsons*, who was born on the 4th day of *January* 1773, and afterwards and in the life-time of the said *Eleanor White*, to wit, on the 4th day of *August* 1813, she, the said *Sarah Chilcott*, afterwards *Parsons*, died; and afterwards, to wit, sometime in the year of our Lord, 1813, the said *James Parsons* died intestate, and without issue, leaving the within named *John Parsons* his brother and heir at law him surviving. On the 4th day of *August* 1764 the said *Betty Chilcott*, the fourth daughter of the said *Richard Chilcott*, intermarried with one *Benjamin Viney*, by whom she had issue, *Thomas Viney*, her only son, who was born on the 5th *March* 1765, and the said *Betty Chilcott*, afterwards *Viney*, afterwards and in the life-time of the said *Eleanor White*, to wit, on the 24th day of *February* 1804, died, leaving the said *Thomas Viney*, her only son and heir at law, her surviving. *Thomas Viney* afterwards, and in the life-time of the said *Eleanor White*, to wit, sometime in the year of our 1795, intermarried with one *Catherine Phelps*, by whom he has issue one son, *Thomas Viney*, who is still living; and the said *Thomas Viney*, the father, afterwards on the 15th day of *July* 1819, duly made and published his last will and testament in writing, bearing date the same day and year last aforesaid, and signed by three credible witnesses, according to the form of the statute in such case made and provided, and thereby gave and devised all his real estate to the said *Catherine Viney*, her heirs and assigns for ever. *Thomas Viney*, the father, afterwards and before the said time

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WINTER
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FERRANT.

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DOE dem.
WINTER
against
PRESTON.

when, &c., to wit, in the month of *September*, in the year of our Lord 1819, died, without revoking or altering his said will, leaving the said *Catherine Viney*, his widow, and the said *Thomas Viney*, his only son and heir at law, him surviving. On the 11th day of *November* 1770 *Agnes Chilcott*, the fifth daughter of the said *Richard Chilcott*, intermarried with one *John Greenslade*, by whom she had issue *Thomas Greenslade*, her only son, who was born on the 10th day of *December* 1772, and afterwards, to wit, sometime in the year of our Lord 1780, the said *John Greenslade* died, leaving the said *Agnes* his widow, and the said *Thomas Greenslade* his son, him surviving, both of whom are still living. But whether, &c.

The first of these cases was argued at the sittings in *banc*, after *Hilary* term 1822, by *Jeremy* for the plaintiff, and *Bernard* for the defendant; and the second was argued by *Carter* for the plaintiff, and *Bernard* for the defendant. The case then stood over, that the third might be tried, and at the sittings after *Easter* term 1824 it was argued by *Preston* for the plaintiff, and *Bernard* for the defendant. The judgment was then postponed with a view to an amicable arrangement amongst the parties, but the negotiation having been broken off, and now there being a difference of opinion amongst the learned Judges, who heard the arguments, they delivered their judgments *seriatim*.

LITLEDALE J. After stating the special verdict, proceeded as follows: It appears by the special verdict, that *John Chilcott* is dead, and never had issue male; he either took an estate for life or in tail, and either way
the

the remainder to his family is at an end; then comes the devise to the family of *Richard Chilcott*. The devise is as follows: "if no male heir lawfully begotten by *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, paying unto such of the daughters of *Richard Chilcott*, which shall be then living, 100*l.* each at the time of the taking possession of the aforesaid estates." And the question is, which part of his uncle *Richard's* family satisfies the language of this part of the will. It is not the daughters; they are the several stocks from whom the heirs are to emanate. It must be amongst the males that the remainder-man is to be found, and it may be said that all the males who represent the daughters of *Richard Chilcott* make up one heir. But if the male heir of each of the daughters was to take a part, and altogether to constitute in the aggregate one heir, it would have required some other words to express that intention. It is *heir* in the singular number, and the *first*. These two expressions, therefore, are such as to shew that only one person was meant. The question is, whether any one or more persons answers the description of *first male heir* of the branch of the family of *Richard Chilcott*, uncle of *Emanuel Chilcott*, the testator. I am of opinion, that *Thomas Viney*, the son of *Betty*, the fourth daughter of *Richard Chilcott*, who was born on the 5th of *March* 1765, and whose mother died the 24th *February* 1804, answers that description; and that he having devised to his wife in fee, she is now entitled to recover in the ejectment, in which she is one of the lessors of the plaintiff. It is a general rule (though there

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there may be some exceptions, which do not apply to the present case), that if an unnamed person takes by purchase, he must answer the whole description of the designation by which he is mentioned in the document, whether deed or will. And then it is to be seen whether *Thomas Viney* did answer the full description of "first male heir of the branch of *Richard Chilcott's* family."

First, he is an *heir* of one of the daughters, which daughter, with her four sisters, constitute the family; his mother *Betty*, died in 1804, and he was born in 1765. In 1804, when his mother died, the particular estate which was to support the contingent remainder still continued. Upon her death the remainder became vested in him as an heir, provided it should appear that he filled the other descriptions of *first* and *male*. He was a male heir, because he was the son of that daughter, without the intervention of any female, and, therefore, could take either by descent or purchase.

Thus, then, he fills two of the descriptions. But it will be a subject of more discussion, whether he fills the description of *first* within the meaning of the will. His mother having died before any of her sisters, he was the first person who filled the character of heir, if heir is to be taken in that sense of the word, which says that a person cannot be heir till the ancestor be dead; and if that be so, then as he is the first person of the descendants of the daughters that fills the character of heir, he unites in him all the three parts of the description; he is heir, he is male heir, and he is first male heir.

There is a maxim in the law, *nemo est hæres viventis*,

tis, the accuracy of which has never been questioned as a general proposition. In *Co. Litt.* 378 a. it is said, if a lease for life be made, remainder to the right heirs of *J. S.*, *J. S.* being then alive, it sufficeth that the inheritance passeth presently out of the lessor, but cannot vest in the heir of *J. S.*, for that living the father, he is not in rerum naturâ, for *non est hæres viventis*; so as the remainder is good upon this contingency, viz. if *J. S.* die during the life of the lessee. In *Archer's case* (a), the devise was to *A.* for life, and afterwards to the next heir male of the body of *A.*, and to the heirs male of the body of such next heir male. *A.* made a feoffment: Held, that the right male heir of *A.* could not enter for a forfeiture in the life of *A.*, for he cannot be heir as long as *A.* lives. It was also held, that the remainder to the right male heir of *A.* is good, although he cannot have a right heir during his life, but it is sufficient that the remainder vests eo instanti, that the particular estate determines. In *Challoner and Bowyer's case* (b), *W. Bowyer* devised to his youngest son in tail, remainder to the heirs of the body of the eldest son, remainder to the daughters in fee. *W. B.* died, and the second son died without issue, living the eldest son, who had issue, who was the tenant in an assize of novel disseisin. It was contended, that though in a grant, the son, living his father, cannot take as heir by limitation as heir to his father, because that none can be said or held heir to his father as long as the father is alive, yet by way of devise the law shall favour the intention of the party, and the intent of the devisor shall prevail. But all the Court

1836.

Don dem.
Worren
against
Pearson.

(a) 1 Co. 66 b.

(b) 2 Leon: 70.

1826.

DOX dem.
WINTER
against
PERBATT.

was strongly against it, and held that as well in the case of a devise as a grant all is one, and judgment was given for the plaintiff. In *Else v. Osborn* (a), *A.* had made a settlement to the use of himself for ninety-nine years (if he so long live), remainder to trustees and their heirs during his life, &c. remainder to the use of the heirs of his body, remainder to himself in fee. *A.* had two sons; and *A.* and the trustees and the eldest son, when of age, joined in a feoffment and fine to *B.* in fee, as a security for so much money; the eldest son died without issue, and the second son brought a bill to set aside this mortgage. The Lord Chancellor said, "this is plainly a contingent remainder, being limited to the heirs of the body of *A.*, who can have no heir during his life; for *nemo est hæres viventis*."

The word *heir*, however, is not always used in the law as meaning a person whose ancestor is dead, and there are several cases where it applies though the ancestor be living, and in those cases it means *heir apparent*. In *Counden v. Clarke* (b), illustrations are given of heirs of this kind as applicable to lands in gavelkind and borough *English*, which, however, do not apply, as there *heirs* are the same as *heir* applicable to socage lands. In *Burchett v. Durdant* (c), illustrations are given from writs of ravishment of ward, *Quare filium et hæredem raptuit*, and the statute 25 *Ed.* 3., by which it is treason to kill the heir of the king. In *Darbison v. Beaumont* (d), instances of *heir* being used to mean *heir apparent*, are more fully stated, and other illustrations besides

(a) 1 *P. Wms.* 387.(b) *Hob.* 31.(c) 2 *Vent.* 311. 313.(d) *Fortescue*, 18. 22.

those

those in *Ventris* are there given. But in all these instances, the word *heir* from the subject-matter necessarily means *heir apparent*, and not heir after the death of the ancestor. And it may be contended, that because the word *heir* has these various significations, and may mean heir apparent as well as full heir; it ought in this instance to be applied as such, and if that were the case, then *Thomas Chilcott Winter*, the brother of *Isaac Winter*, a lessor of the plaintiff, would be the person entitled, because he was born before *Thomas Viney*, viz. in 1763, and was the first born male of the branch of *Richard Chilcott's* family; and then, as he was an heir and was a male, the being first born gave him the character of heir apparent, which in this view of considering it is the same thing as heir; and that, therefore, he filled the full and entire description of *first male heir*. There are certainly many instances under wills, where the word heir has been used in the sense of heir apparent. In *Burchett v. Durdant* (a) there was a devise to *Higden* in trust for *Robert Durdant*, and after his death to the heirs male of his body *now living*, and to such other heirs male and female as he shall hereafter happen to have. The principal question was, whether the devise to the heirs of the body of *Durdant* now living, was a vested or a contingent remainder. It was urged that a man cannot take as heir in the life of his ancestor, for *nemo est hæres viventis*. But it was resolved that it was a remainder vested, for being limited to the heirs of the body of *Robert Durdant* now living, it was a sufficient designation of the person, and as much as if he had said heir apparent.

(a) 2 Vent. 311.

1826.

 DORRIS dem.
 WINTER
 against
 FERRATT.

The

1826.
 ———
 Don dem.
 Writen
 against
 Plaintiff.

The ground of this decision is the use of the words *now living*. If it had not been for the introduction of these words, the general doctrine is admitted. And, even as the case was, Chief Baron *Atkyns* and Mr. Justice *Powell* were of opinion that it was a contingent remainder, but as there had been a judgment in the House of Lords on another case upon the same will where it was held to be a vested remainder, they thought themselves bound by that decision (a). In *Darbishon v. Beaumont* (b), a remainder was devised to the heirs male of the body of *E. L.* lawfully begotten. *E. L.* was living at the time of the remainder taking place, yet it was

(a) The case here alluded to was *James v. Richardson*, an ejectment on the demise of *G. Durdant*, the eldest son of *Robert Durdant*. It is reported in several books, 2 *Lev.* 232., 1 *Ventr.* 334., Sir *T. Raym.* 330., and Sir *T. Jones*, 29. By the report in *Lev.* it appears that the Court of K. B. held that the remainder vested in *G. Durdant*, as heir male of his father, that judgment was reversed in the Exchequer Chamber, but affirmed in the House of Lords, the judgment of the Exchequer Chamber being there reversed, and nothing is there stated as to the opinions of particular Judges. At the end of that case it is stated, that upon the death of *G. Durdant* a new ejectment was brought against his heir, and upon a new hearing of this matter, judgment was given in the K. B. for the heir, that judgment was affirmed in the Exchequer Chamber, and again in the House of Lords. According to the report in Sir *T. Raym.* the judgment of the K. B. in *James v. Richardson* was reversed in the Exchequer Chamber, "nemine contradicente præter, *Atkyns* Justice del Com. Bank." According to the report in 1 *Ventr.* 334. there was a difference of opinion in the Court of K. B., *Scroggs* C. J., *Wylde*, and *Jones* Js., holding that the remainder was vested, *Dolben* J. that it was contingent. In the report by Sir *T. Jones*, he merely states what were the several judgments pronounced in the case, without alluding to the opinions of individual judges. When *Burchett v. Durdant* afterwards came before the Court of Exchequer Chamber, it is said in 2 *Ventr.* 313., that *Atkyns* C. B. and *Powell* Justice, seemed to be of opinion that the remainder was contingent.

(b) *Vin. Devise*, U b. pl. 5.

held

held that the heir apparent should take. This taken by itself would be an authority to shew, that *heir* in a will means heir apparent without any further language to shew such a meaning. But it is a very short minute, and begins very abruptly in these words, *and for default of such issue*, without stating what had gone before. In the report of the same case, 1 *P. Wms.* 229., it appears that the testator by his will gave a legacy to *E. L.* whom he notices as being living, and that she had three sons. And that is the express ground of the decision. Besides, the testator gave the heir at law an annuity, which shewed that she should not have the estate. But this judgment of the Exchequer was reversed in the Exchequer Chamber by the two chief justices, though that reversal was reversed in the House of Lords. And that shews there was a great difference of opinion upon it. (And I have before noticed, that in the case of *Burchett v. Durdant* (a), the chief baron and one of the puisne judges were of a different opinion, only that they considered themselves as bound by the decision of the House of Lords, so that in those two cases all the three chiefs and another judge differed in opinion.) The same case is reported in *Fortescue*, 18. And there it appears by the will that *Elizabeth Long* was living, and that is the main ground of the argument of *Fortescue*. And these cases, therefore, are all the same, and appear to have undergone great consideration, but the decision was by no means founded on the unanimous opinion of the judges. It is not, however, necessary to question the doctrine there established; it appears quite correct and consistent with the general rules of law. In *Good-*

1826.

Dec dem.
Writen
against
Perman.

(a) 3 *West.* 511.

right

1826.

Don dem.
WINTER
against
PRERATT.

right dem. Brooking v. White (a), devise was of a remainder to the heirs and assigns of *Margaret W.*, and held that her heir might take though she was alive; but it appeared by the will that she was alive. *De Grey C. J.* says, that within a century, a more liberal construction of the words of a testator has prevailed, and they have been generally taken in their popular sense, and he cites cases to shew that where the words *now living* have been used, the person called *heir* may take, notwithstanding the ancestor be alive. In that respect *De Grey C. J.* delivers his opinion in conformity with the cases I have already cited, and this case in *Blackstone* does not go in the least further than those cases, and leaves the law just as it was, and is only a recognition of the decision in the House of Lords, in which the Court of Common Pleas in this instance acquiesced; but it does not at all touch the point, whether the word *heir* can be held to mean *heir apparent* where nothing in the will tends to shew it was used in that sense. All these cases, therefore, only come to this, that if there be sufficient upon the will to shew that the word *heir* is used in the will in such a way as proves the testator to have meant *heir apparent*, it shall be so considered as he intended it, but they establish nothing more. In this will there is nothing to shew that he did intend it to mean *heir apparent*. In the cases above cited, the words *heir* or *heirs* have been applied to the descendants of some one individual; here they are applied generally to those of the five sisters. No preference is shewn to any of them, or of their descendants; they are all treated

(a) 2 *Blackst.* 1010.

alike where there is a sum of 100*l.* directed to be paid to such of them as shall be alive when the remainder-man comes to the estate. Probably the testator wished to shew no preference, and to avoid that, he purposely made it contingent as to which part of the family should have the estate.

This sort of uncertainty in the present will, as to who was to be the object of the testator's bounty, is only what must frequently occur in devises of contingent remainders. In *Boretton v. Nichols* (a), A. made a feoffment to the use of himself for life; remainder to C., his second son, for life; remainder to the use of the first son of C. who should have issue male of his body, and his heirs for ever; which is quite as uncertain and contingent as the present.

In considering, however, what is the meaning of the word *heir*, it is necessary that I should advert to a numerous class of cases arising out of the doctrine laid down in *Littleton*, s. 21, 22, 23, 24, and in Lord Coke's Commentaries upon them, that to entitle a person to claim as purchaser under a devise to heirs male or heirs female of the body, under particular circumstances, a person must shew that he fills every part of the description, and that he is actual heir. That, I think, is true as far as applies to this case, and as I have endeavoured to shew; but a very numerous class of cases, as applicable to this rule, have occurred, and are collected in a most elaborate and ingenious note of Mr. Hargrave to *Coke Littleton*, 24*b.*, and in another note to *Coke Littleton*, 164*b.* The cases he

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Doz dem.
WINTER
against
FERRANT.

(a) Cro. Car. 364. Lit. Rep. 159.

1826.
 ———
 DOR DEM.
 WINTER
 against
 PREROGATIVE.

refers to, are in support of Lord *Coke's* position, that to entitle a person to take by purchase under a limitation to the heir female, it is necessary to shew the person to be heir as well as female.

I have not entered into a consideration of these authorities, as I think they do not bear upon this case; and for the decision of the question, I think it not material whether Lord *Coke* is right or wrong. The point in all this class of cases has been, whether the person claiming was heir as well as heir apparent; i. e. not whether he or she was heir with reference to the maxim of *nemo est hæres viventis*, but heir with reference to somebody else being heir, and therefore the person claiming being neither heir as representing a deceased ancestor, or heir apparent. This may be illustrated by what Lord *Coke* says in *Co. Litt.* 24 *b.* "When a man giveth lands to a man, and the heirs female of his body, and dieth, having issue a son and a daughter, the daughter shall inherit; for the will of the donee (the statute working with it) shall be observed. But in case of a purchase it is otherwise, for if *A.* have issue a son and daughter, and a lease for life be made, remainder to the heirs female of the body of *A.*, *A.* dieth, the heir female can take nothing, because she is not heir; because she must be both heir and heir female, which she is not; because the brother is heir, and therefore the will of the giver cannot be observed; because here is no gift, and therefore the statute cannot work thereupon."

But the question here, is not whether the different claimants are heirs or not, for each of them is an heir, i. e. either an heir after the death of his ancestor, as is the case of *Thomas Viney*, who is heir to *Betty*, the
 fourth

fourth daughter of *Richard Chilcott*, or as is the case of *Thomas Chilcott Winter*, who was heir apparent to *Joan*, the second daughter, or as is the case of *Matthew Perratt*, who is heir apparent to his mother *Betty*, who was heir of *Mary*, the first daughter. For each of these three persons represent an ancestor of whom they are respectively heirs; each is therefore an heir in one sense or another of the word. It is not a question of being heir to the testator, or being heir to *Richard Chilcott*, it is an heir of the branch of his family, which branch consisted of five females, each of whom was to be an ancestor, from whom several heirs were to spring.

I have not particularly noticed the claim of *Matthew Perratt*; his claim is liable to the same objection as that of *Winter*, because though his mother *Betty* became heir to her mother *Mary* on the death of *Mary*, yet *Betty*, the daughter of her mother *Mary*, is still living, and therefore *M. Perratt* does not even now fill the character of heir, as his mother is alive; and his claim, therefore, cannot be supported.

. And, upon the whole of the case, I think it resolves itself into this, whether the word *heir* is to be taken to mean the heir of a deceased ancestor or *heir apparent*; and as I think it means the heir of a deceased ancestor, I think judgment should be given for the plaintiff on the count on the demise of *Catherine Viney*, in the action in which she and *Thomas Viney* and *T. Greenslade* are lessors of the plaintiff; and judgment for the defendant on the other counts on the several demises of *Thomas Viney* and *T. Greenslade*, and also for the defendant in the two other ejectments.

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DOX dem.
WINTER
against
PERRATT.

1826.

Doz dem.
WINTER
against
PEBBLE.

HOLROYD J. The different claims of the several parties in these three ejectments, arise upon the will of *Emanuel Chilcott*, made 16th March 1786. By that will, after giving half of *Truckwell* estate (that estate being the premises in question) unto *Eleanor White*, during her natural life, and the other half (inter alia) unto *Elizabeth Chilcott*, his wife, during her natural life, with power for her to give what she thought proper to her sisters *Eleanor White* and *Ann White*, during their natural lives, he devises as follows: “ And after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Eleanor White*, and *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell* estate, to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any, free land, not to be sold nor mortgaged on any account whatsoever; but to remain in the *Chilcott*’s family for land of inheritance, with two cottages, gardens, and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Wetcombe*, free land, and if no male heir, lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott*’s family, who lived at *Hancrick Farm*, yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100*l.* each at the time of the taking possession of the aforesaid estates.”

The testator died 27th May 1787, leaving the above named *John Chilcott*, who was his cousin and heir at law, surviving, who afterwards dying without issue male, in the life-time of *Eleanor White*, his estate tail became extinct, and *Elizabeth Chilcott*, the testator’s widow, having

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—
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 against
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branches still remained, both which the testator had in his contemplation in his devises of the *Truckwell* estate. One of those two branches had consisted of his elder uncle *John Chilcott*, who was dead, leaving only one child, the testator's said kinsman *John Chilcott*, named in the will, who at the time of making the will was living, and had one child only, a daughter, then unmarried. As to the other of those two branches, which the testator calls the branch of his uncle *Richard Chilcott's* family, *Richard Chilcott*, who was the testator's younger uncle, was dead without issue male, but he had left five daughters, all married and living; *Mary*, the eldest daughter, had four daughters, but no son or male descendant then, and each of the other daughters of *Richard Chilcott* had a son or sons then living. This was the state of the *Chilcott* family at the time of making the will, and the same continued to be so until the testator's death; and these five daughters of *Richard Chilcott*, and their children, were, at the time of making the will, all well known to the testator. This being found to be the state of things at the time of making the will, let us see what these devises are, as they regard each of those two remaining branches of the family. With respect to the first of those branches, the testator directs the premises, after the life estates are expired, to come to *John Chilcott*, (who was, as above stated, the son of the testator's elder and deceased uncle *John Chilcott*,) or to his male heir, if any, not to be sold or mortgaged, but to remain in the *Chilcott* family for land of inheritance, and if no male heir, lawfully begotten by the said *John Chilcott*, the devisee, then he devises over in favor of the first male heir of the second of those two branches. The devise as to the first of these two branches of the *Chilcott* family,

family, was, in truth, a devise to such person only, as either was, at the time of making the will, or would be at the time of the death of the testator, when the will would first begin to operate, the male heir of that branch of the family in that strict sense which the maxim "nemo est hæres viventis," requires. *John Chilcott*, the devisee, was, in the most strict sense, the male heir of that branch of the family, his father being dead. If he, therefore, survived the testator, he would be the only person to take under the devise to or in favor of that branch of the family: and so it would be in case he died before the testator, supposing that his male heir would take no estate by purchase, as would be the case if in the devise to him, "or to his male heir, if any," the word *or* is to be construed *and*. But supposing the words are to be taken strictly in the disjunctive, so as to prevent the estate to the male heir from lapsing by the father's death during the testator's life-time, still no person could take under that devise who was not both heir (in the above sense of the word *heir*) and male, according to the cases put by Lord Coke in *Co. Litt.* 25 b.; and the son of *John Chilcott*, in case he left one, or if otherwise, the son of his daughter, in case she had died and left one, would be the only person to take under the above description according to those authorities. Her son might have taken, being both heir and male, but according to those authorities, the estate would, I think, not have gone to her son, unless she were dead, he not answering that description of heir during her life, unless something can be collected from the will to show a contrary intent, and no such contrary intent, I think, can be sufficiently made to appear. No other

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 Dux dem.
 WINTER
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male heir, but an heir male of his body, could take under the above description, whether by descent or purchase, for the words "his male heir," to be a good description in a will, to take as a purchaser, are to be construed "heir male of his body," according to the doctrine laid down in *Co. Litt.* 27 a., *Hob.* 32., and Lord *Ossulston's* case (a) : even if the subsequent words, "and if no male heir lawfully begotten by the said *John Chilcott*," had not shewn that such must be the construction. If they are to be construed words of purchase, his (*J. C.'s*) son, if he had one, would, instead of the father, have taken as a purchaser under that description, if the father had died in the testator's life-time, as that son would then have been the heir male of the body of his deceased father, and of that branch of the family, within the same strict sense of the above maxim ; and so might the daughter's son (if he, *J. C.*, left no son, and the daughter were dead) have taken by purchase, though not by descent under that description. So that no person could, I think, be held to take under the devise in favor of the first of these two branches of the family of the *Chilcotts*, unless he was, or until he came under the description of "male heir," within the above maxim "nemo est hæres viventis."

This being in my opinion the effect of the devise in favor of the first of the above two branches of the *Chilcott* family, that no one but a male heir, according to the above strict sense of the expression "male heir," could take under it ; and the words "male heir," (so far as they regard a male heir of that branch of the family),

(a) 11 *Mod.* 189. 5 *Salk.* 356.

being

being used by the testator only in that same strict sense, let us see what the devise over in favor of the second of the above two branches of the *Chilcott* family is, and what should be its construction; and whether the devise in favor of the first branch, and the necessary effect of that devise can, and if so, how far it can, aid us in the collection of the testator's intention, or in the legal construction and effect that is to be given to this devise over in favor of the second branch. This devise over is, "and if no male heir lawfully begotten by the said *John Chilcott*," that is to say, "if no such male heir of the body of *John Chilcott*, the devisee, as the above maxim requires;" then "the above lands to fall to the first male heir of the branch of my uncle, *Richard Chilcott's* family." There were, at the time of making the will, *male heirs apparent* of the respective bodies of the four younger daughters of *Richard Chilcott*, and this was known to be so by the testator, and yet he does not (as he did as far as could be done in the devise in favor of the first of the above two branches of the family, *viz.* in the devise to his kinsman, *John Chilcott*, or his male heir) designate any person by name as the person he intended should take, as he might easily have done, if he intended the first male heir apparent, as such heir was then in esse, and the testator knew him. Nor does he say from which daughter of *Richard Chilcott* such male heir should be descended. But the heirs of *Richard Chilcott* were then all females, and the testator did not intend the estate should fall to a female heir or heirs. I consider his intent to have been (and unless his intent can be shewn to have been otherwise, the legal construction, I think, must be) that when and as soon as there

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—
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there came to be a male heir, instead of a female one (which could only be by there arising a male heir within the maxim, “*nemo est hæres viventis*”), the estate should go to and vest in such male heir, and the testator contemplated that there would, or at least might be such a male heir by the death, in the interim, of some at least of those female heirs, the daughters of *Richard Chilcott*, as appears by the condition or proviso that the male heir should pay to such of his (*Richard Chilcott's*) daughters, which should be then living, 100*l.* each, at the time of taking possession of the aforesaid estates. The eldest daughter had no son, but had four daughters, the eldest of whom, after the testator's death, bore a son, the defendant, *Matthew Perratt*: but he is not even yet a male heir of that branch of the family, within the description of the maxim, his mother being still living; and instead of being the first, he is the last male heir of the family in the order of time of birth, even if an heir apparent is to be considered as coming within the *e-* vise. The person who first became such male heir, in that strict sense of the expression, was *Thomas Viney*, the son of *Betty Viney*, *Richard Chilcott's* fourth daughter, who, on the death of his mother, who died on the 24th *February* 1804, in the lifetime of *Eleanor White*, and, consequently, during the continuance of her preceding life estate, became the male heir of the body of his mother, and her sole heir, within that strict sense of the above maxim, and became also the first male heir of the body of *Richard Chilcott*, in order of time, according to that strict sense, though not his true and complete heir within the maxim of all the co-parceners making but one heir, but such a male heir, as under the denomination

ation of male heir in a will, to be capable of taking as a purchaser, according to *Co. Litt. 25b.*, though he claimed through a female; and though he could not on that account take an estate *by descent*, as *Richard Chilcott's* heir male. But he was, in the fullest and strictest sense of the words "male heir," the complete male heir of the body of his mother, and, consequently, the complete male heir, in that same full and strict sense, of the body of one of *Richard Chilcott's* family and co-heirs, though he did not fill the character of full male heir of the body of *Richard Chilcott* himself, within the maxim, that all the parceners together make but one heir. But the devise over is not "to the first male heir of *Richard Chilcott*," or "of the body of *Richard Chilcott*," but "of the branch of *Richard Chilcott's* family," which I apprehend must be taken to mean the first male heir of one of his daughters, whether the words of the will, "the first male heir of the branch of my uncle, *Richard Chilcott's* family" are to be construed as if the expression had been either "the first male heir of my uncle *Richard's* branch of the *Chilcott* family," or had been "the first male heir of a branch of *Richard Chilcott's* family;" and the devise must, I think, have one of those two constructions given to it; for in the state of that family, it cannot, I think, be supposed that the testator meant by his expression "first male heir," &c., a person or persons who should fill the character of heir male of the body of *Richard Chilcott*, or of the whole family, within the above maxim of all the parceners making but one heir, so as to substantiate the claim made in one of these ejectments, in behalf of a son of each of *Richard Chilcott's* daughters. Such a construction would, instead of

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marking the word "first" as significant of a contrary intent, render that word totally inoperative, and give the same effect to the devise as if the words had been "heir male" or "heirs male" only; and the direction that the male heir should pay to such of the daughters of *Richard Chilcott* as should be then living 100*l.* each at the time of taking possession of the aforesaid estates, is inconsistent with such a construction. *Thomas Viney*, therefore, on the death of his mother, became, I think, entitled to the *Truckwell* estate in remainder; the estate then, in my opinion, becoming vested in him in remainder, as the person first answering the description of first male heir of the branch of testator's uncle *Richard Chilcott's* family. And the estate in remainder having once vested in him, as such male heir, by purchase, it would not, by any subsequent coming in of any other heir male of an elder daughter of *Richard Chilcott*, or by any other event (according to the doctrine in *Couden v. Clarke* (a) and *Driver v. Frank* (b)), be divested out of him. *Thomas Chilcott Winter*, the eldest son of the second daughter of *Richard Chilcott*, was the first born male of *Richard Chilcott's* family, and it has been contended, that the estate vested in him, as answering the description of the "first male heir of the branch of that family," he being the first born male heir apparent of any part of *Richard Chilcott's* family. It has been contended, too, that *Matthew Perratt*, as the first male descendant of the eldest daughter of *Richard Chilcott*, is the person answering the description of first male heir; not such in order of time, but as being a de-

(a) *Hob.* 33.(b) 3 *M. & S.* 25. 8 *Taunt.* 468.

scendant

scendant of the eldest daughter, and as such the highest and most worthy. But neither of these persons can be deemed to have been entitled to the estate, unless a mere male heir apparent can be brought within the devise. The Master of the Rolls (Lord *Alvanley*), in *Thellusson v. Woodford (a)*, in laying down the rule of construction applicable to all wills, after stating that every word is to be taken according to the natural and common import, adds: "And if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is *plain* the testator did not so intend." If it appeared therefore, plainly, by the will, to have been the testator's intention that an heir male apparent should take by the devise, I agree that the rules of law would not prevent the giving such a construction to the will as to carry that intent into effect; but I see no such plain intention on the face of this will, but from the devise to the first branch of the family, and from the sense in which the words "male heir" are used in that devise, and in which they are also afterwards used in the description of the event on which the devise over is given, I should infer a contrary intent; and the words "male heir" in the expression "first male heir," &c. in the devise over cannot, I think, by law receive a different construction from the sense in which the words "male heir" are used before, unless there be something clearly to shew (not a conjecture merely) that the testator intended to use the expression there in a different sense from that in which it was used before, and so as to include an heir apparent; and I cannot see any such

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(a) 4 Ves. jun. 329.

intent.

1826. intent. On the contrary, having previously given the estate to such only of the first branch of the family as were strictly heirs, and used the expression "male heir" in that strict sense, so far as relates to them, it appears to me that it must be taken he meant the like as to the second branch of the family, as to whom he uses the like expression, except so far as a different intent can be made to appear. Independently of manifest or apparent intention, or where the context or necessary or plain import is not in favour of a contrary inference, the legal construction of a devise to the "heir male," "next heir male," or "first male heir," is, I apprehend, such as to exclude a mere heir apparent from taking under such a devise, on the maxim "*nemo est hæres viventis.*" This rule will apply to the construction of the devises to both branches of the *Chilcott* family; and it will apply to the construction of the devise in question, the devise to the second branch, whether the devise to the first branch be brought in aid or not. This was the rule of the old law as laid down in *Archer's* case (a), and in *Chaloner* and *Bowyer's* case (b), although in later cases instances are shewn both in pleadings and penal statutes (in which I admit great strictness is required) that the word *heir* includes the heir apparent; as in the statute of treason, "the eldest son and heir of the king," in indictments thereupon, and in the writ of *quare filium and hæredem rapuit* brought by the father. But in those cases the objects and context shew manifestly that not only the heir apparent is intended, but that it can apply to the heir apparent alone. Independently of a contrary intent or

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(a) 1 Co. 66.

(b) 2 Leon. 70.

inference

inference arising from the subject matter or the context, which intent or inference must be shewn, the rule of law, I apprehend, as to deeds, and even as to devises, continues to be the same as formerly. It is true that in *Goodright v. White* (a), *De Grey* C. J. states, that 200 years ago the word *heir* might have been thought not sufficient to let in an heir apparent, because the description is not legally and technically true, but that within a century past a more liberal construction of the words of a testator has prevailed, and they have been generally taken in their popular sense, which he says is most likely to have been the testator's meaning. But the cases he cites shew that, without something to afford a different inference, the construction according to the old rule of law must prevail. In *James v. Richardson* (b) the devise was of a remainder (after a life estate to *Robert*) "to the right heirs male of the body of *Robert* now living, and to such others heirs male and female as *Robert* should have afterwards of his body." It was held that the words "now living" referred not to *Robert* only, though he was the last antecedent, but that they referred to all, and signified *heirs male now living*, consequently *Robert's* son, *George*, who was living at the time of making the will, though only heir apparent, was the person intended by the word "heir," especially as the will itself took notice that his father *Robert* was then living. The latter circumstance alone, I think it appears clearly, would not have been thought sufficient, and that circumstance had been held insufficient but a few years before

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(a) 2 W. Bl. 1010.

(b) T. Jon. 99. 2 Lev. 232. 1 Vent. 334. T. Raym. 330.

by

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by the whole Court of Common Pleas, (when Sir Orlando Bridgman was Chief Justice thereof in 1661,) in *Collingwood v. Pace* (a); and notwithstanding both the above circumstances to manifest the intent, in opposition to what would otherwise have been the construction of the words "heirs male," according to the rules of law, the matter was still so doubtful that that judgment was reversed in the Exchequer Chamber. But although that judgment of reversal was again reversed in parliament, the matter was thought still so doubtful, that the same point was afterwards, in the reign of *W. & M.*, contested upon the same will, in the case of *Burchett v. Durdant* (b), first in the Court of King's Bench, afterwards in error in the Exchequer Chamber, where it was thrice argued; and, finally, again in the House of Lords, though in each of those courts the same judgment was given as had before been given in the House of Lords in the case of *James v. Richardson*. The next is the case of *Long v. Beaumont* (c), first in the Exchequer, afterwards in the Exchequer Chamber, and lastly in the House of Lords, cited and also confirmed in *Brown v. Barkham* (d). This was a devise of a remainder "to the heirs male of the testator's aunt, *Elizabeth Long*, lawfully begotten; and for default of such issue, the remainder to testator's right heirs." There was a legacy to the aunt, and legacies to her three sons, taking notice therefore that they were all living, but giving also an annuity to the testator's heir. This was

(a) *Judgments in C. P. by Sir O. Bridgman*, 410.

(b) 2 *Vent.* 311. *Carth.* 154.

(c) 1 *P. W.* 229. 1 *Bro. P. C.* 490.

(d) *Prec. Ch.* 467.

held to be a sufficient designatio personæ to vest the estate in her eldest son in her life, and he was held entitled to take, and that the estate should not lapse, or go to the testator's heir. But the ground of that decision was, that the will, according to the testator's intent, could not otherwise be carried into effect. An annuity was given to the testator's heir, therefore it was held the intent was, she should not have the whole estate. The limitation over to the testator's right heirs was, expressly "in failure of issue male of his aunt *E. L.*" The word "begotten," too, though this has been held otherwise, was held to be equivalent to the words "now living," in *Burchett v. Durdant*. The intent, therefore, was considered to be plain, that the *apparent heir male* of the body of his aunt should take before *his own heir general*, who was not to take until the extinction of all the issue male of his aunt. It was held that it would be hard, therefore, to expound the will in that sense which was the strictest and most rigorous, and would *destroy great part of the will*, at the same time that by law it might have another sense, which would support the whole will and intent of the party, and that his intent should take place if, by any possibility, consistent with the rules of law. To this, and to these reasons, I most fully agree; but notwithstanding these strong reasons, this judgment was reversed by the two Chief Justices in the Exchequer Chamber, though it was finally affirmed in the House of Lords. The rule of law "*nemo est hæres viventis*," was afterwards urged in the case of a devise, in *Brown v. Barkham* (a), in Chancery, where the rule, and the application of it in *Archer's* case by Lord

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(a) *Prec. Ch.* 461.

1826. *Coke*, seems not to have been disputed, where it does not interfere with the intent of the testator ; but that rule was held inapplicable to the case of *Brown v. Barkham*, because there the ancestor was actually dead at the time the devise took place.

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The next case, I believe, is the case I mentioned before, of *Goodright v. White*, where there was an immediate devise, subject to certain terms of years, to testator's son *Richard*, his heirs male, and to the heirs of his daughter *Margaret White*, where it was held that under the latter words the heir apparent of *Margaret* should take during her life ; but that was determined upon the particular circumstances and provisions of the will, shewing that the testator by those words meant her heir apparent, and that his intent was that a present interest should vest in her heir apparent during her life.

I have not found, nor am I aware of any other cases bearing upon this point since Lord Chief Justice *De Grey's* doctrine in *Goodright v. White*, except one. This is a case of *Buck v. Nurton (a)*, in which the rule of construction is laid down by *Eyre C. J.* upon a question, what shall pass under the devise of "a mesuage, with the appurtenances," in which *Heath* and *Rooke Js.* concurred that the word "appurtenances" was to be taken in its technical sense. The Lord Chief Justice said: "Lands will not pass under the word appurtenances, taken in its strict technical sense. They will pass, if it appears that a larger sense was intended to be given to it." He further said: "Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case

(a) 1 B. & P. 57.

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struction I put upon the will appears to me to give full effect to the will according to what I conceive to have been the intent, I think that the estate must be deemed to have vested in *Thomas Viney*, as the person legally answering the description of first male heir of the branch of *R. Chilcott's* family; and that there is no such uncertainty in the will, construing it as I conceive the rules of law to require, as to let the estate pass by descent to the testator's heir at law. The word "first" in the words "first male heir," means, I think, the person who should first become male heir in order of time, there being nothing to shew that the testator intended to use it in a different sense. And as the law gives a *certain* and technical meaning to an expression such as "male heir," unless where a contrary intent appears, the law cannot deem that expression uncertain, so as to pass the estate by descent to the testator's heir at law. If such a contrary intent does not appear, the technical meaning must prevail; if it does appear, the will must operate according to that intent. The heir at law of the testator, therefore, cannot recover, I think, on the ground of a supposed uncertainty; and as no intent contrary to the technical meaning sufficiently appears to me in this will, I think that *Catherine Viney*, the widow and devisee of *Thomas Viney*, and standing in his place, is entitled to recover in the ejectment in which she is a lessor of the plaintiff, and that the defendant, by reason of his possession, is entitled to the judgment of the Court in the other ejectments, as the claims against him in those other actions cannot, I think, be supported.

BAYLEY J. All these cases in which special verdicts are found, depend upon the will of *Emanuel Chilcott*, of
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come to *John Chilcott*, my kinsman living in *London*, or his male heir, if any, free land not to be sold or mortgaged, but to remain in the *Chilcott's* family for land of inheritance; with two cottages, garden and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Wetcombe* free land. And if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hancrick* farm, yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estate." The testator died in 1787. *Ann White* in 1791. *Elizabeth Chilcott* devised her moiety to *Eleanor* and died in 1792. *Eleanor White* did not die till July 1820. *John Chilcott*, the cousin, was then dead without issue male, so that if any claim could be made under the testator's will, it could only be under that part which directed that the lands should fall to the first male heir of the branch of the uncle *R. Chilcott's* family; and to recover under the will, the claimant must make out that within the meaning of the will he was such first male heir. When *Eleanor White* died, *Mary* the defendant's grandmother was dead. *Sarah* and *Betty* were dead; *Joan* and *Agnes* were living. *Mary*, defendant's grandmother, died before *Sarah* or *Betty*, and *Betty* died before *Sarah*, and under these circumstances defendant claims to be first heir male, because he is the male descendant of the eldest cousin. *Isaac Winter* claims as heir of his brother *Thomas Chilcott Winter*, because *T. C. Winter* was the son of the eldest of *Richard's* daughters who had a son, and because he was born before

before any of the other daughters had a son. *Thomas* and *Catherine Viney* claim in right of *Thomas Viney*, *Betty's* son; because of the sons of *Richard's* daughters he first filled the character of heir, inasmuch as his mother died before any of the other daughters that had a son; and *John Parsons* and *Thomas Greenslade* insist that all the sons or male descendants of *Richard's* daughters make but one heir, and therefore, they are each entitled to a share of the estate. The heir at law says, that if the devise admits so many claimants, and leaves it in doubt which of them is intitled, the devise is void for uncertainty; and unless the Court is enabled to say with sufficient legal certainty who is intitled, the heir must prevail. Under a limitation, by way of remainder, in a will, to the family of *J. S.*, the word *family* is considered sufficiently certain, and the heir at law of *J. S.* is entitled, *Chapman's case* (a), *Doe v. Smith* (b), *Wright v. Atkyns* (c), so that had the limitation here been to the family of *Richard Chilcott*, each of his daughters would have taken one-fifth. But as the limitation is to the first male heir of that branch, the question is, whether the law can give any and what definite meaning to the words, "first male heir." In the first place, they seem to contemplate an individual person, so as to exclude the construction which would let in a male descendant of each daughter as one entire heir; and if so, we are to see whether the law has any rules which will enable us to say, who is that individual. Amongst sisters, though they make one entire heir, where it is necessary to give any one a preference, the law gives it to the eldest. Thus, if an advowson belongs to parceners,

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(a) *Dyer*, 335 b.

(b) 5 M. & S. 126.

(c) 17 Ves. 255.

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and they do not agree whom to present, the right to present the first turn is in the eldest, and her representatives. The right to present the next turn in the second, and so on, *Co. Litt.* 166 *b.*, 186 *b.*, *Harris v. Nichols* (a). And if parceners agree that a stranger shall divide the estate into shares, but do not fix in what order they shall choose, they shall choose according to seniority, *Co. Litt.* 166 *b.* But this privilege does not pass to the representative of each, because it is considered as arising from the tacit or implied consent of the parties, and is not, as in the case of presentations to advowsons, given by law. But these instances shew, that where it is necessary to distinguish between persons in equal degree, as sisters, the law makes the distinction in favor of the eldest, and there are authorities which bring that rule very near the present case. In *Co. Litt.* 25 *b.* Lord *Coke* puts this very case, "If lands be devised to one for life, remainder to the next heir male of *B.* in tail, and *B.* has two daughters, each of whom has a son, and *B.* and the daughters die, some say this is void for the uncertainty, some that the eldest shall take because worthiest, others that both shall take because they make but one heir." Lord *Coke* elsewhere lays it down as a rule applicable to *Littleton*, that where he sets down differing opinions, he ever sets down his own last; and if we apply this rule to him, we must take it as his opinion, that the better opinion was that both should take; and that the next opinion was, that the eldest should take. Whether he means by the eldest the son of the elder sister, or such son as either of them may first have, he does not say; but I should think the law which regards certainty and

(a) *Cro. Eliz.* 19.

order,

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stance with the other reports. The report in *Palm.* 11. (17 *Jac.*) states that the testator had three daughters, that he devised to the two younger for their lives, remainder proximo consanguinitatis et sanguinis, and that the issues of the two younger daughters brought trespass against the elder. *Montague J.* thought the elder daughter entitled to the whole, *Dodderidge* and *Houghton Js.*, that she was entitled to a third only; but whether she was entitled to the whole or a third, the action was clearly barred, because one joint tenant cannot bring trespass against another. The name of this case was *Perriman v. Biford*. In *Palm.* 303. *Perriman v. Pierce* is reported. It states that the testator had three wives and eight daughters and a son, that he devised to the younger daughter for life, remainder to the son in tail, remainder to the two daughters by the second wife for life, remainder proximo consanguinitatis de sanguine of the devisor; that the eldest daughter had two sons, *John* and *William*, that *John* died, leaving the lessor of the plaintiff his son and heir; that the two daughters of the second wife, the devisees for life, left issue, but the son and the other daughters were dead without issue; and the questions were, whether the issues of the three daughters should take by the words "proximo consanguinitatis, &c." or the issue of the elder only, and if the latter, whether the son of *John* or *William*, and after divers motions it was resolved by *Dodderidge*, *Houghton*, and *Chambelain*, that the issue of the eldest daughter alone should take, and that *John's* son should take, not *William's*, but upon the first of these points they did not agree in their reasons. *Houghton* said, if a man had three daughters, and devised to the youngest in tail, remainder proximo consanguinitatis, the eldest shall take, for though all are in equal proximity of blood, the singular

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Bisfeld, nearest in consanguinity, and wherever the law is compelled to make a distinction between them, she ranks first, and the person who is male heir through her, is as it seems to me, entitled to the appellation of first heir. To apply the word first to the son of such sister as first has a son, or to the son of such sister as shall first die, which are the other rules insisted upon in the argument of these cases, is to decide upon chance and accident, not upon principle; and the language of this clause considered with reference to the state of *Richard Chilcott's* family at the time this will was made, falls in with the notion, that by the words *the first*, the testator was contemplating his nieces according to their seniority, and meant that a male descendant of the eldest should take in preference to a male descendant of the second, and so on. Each of the four younger nieces had a son at the time the will was made, and testator, who knew their ages, could without difficulty have pitched upon each by name, so as to have made every one of them in such order as he might have thought fit, the objects of express devise. The eldest alone had no son, and though there was little probability she should, for she was above forty-six years old, testator might wish to take the chance, and with a view to the chance, might devise as he has done, to the first male heir. But without relying upon what might be this testator's motives, I am of opinion, that upon a limitation to the first male heir of several sisters, the families of the different sisters are to be resorted to, according to their seniority; and that of several males in equal degree, he is to be deemed first male heir who is found in the elder sister's line. Thus in this case, had *Mary*, the elder sister, had a son, though he had been younger than the sons of each of the other daughters, I should have thought

thought him first male heir; so if each of the other four daughters of *Richard Chilcott* had had daughters only, though each of such grandchildren had had a son born before *Matthew Perratt*, I should have thought *Matthew Perratt* entitled as being in that case first male heir. But as *Matthew Perratt* is the son of a daughter of *Richard Chilcott's* eldest daughter, not the son of a son, I think he cannot be said to fill the character of first male heir of *Richard Chilcott's* branch, but that that character belongs to *Isaac*, the son of the next eldest sister. But before we can say that *Isaac Winter* is entitled, it is necessary to consider whether, as his mother was living when *Eleanor White*, the last tenant for life died, he could be considered as first male heir of the branch of *Richard Chilcott's* family during her life; and this will depend upon two legal rules, the one, that to entitle a man to take as heir male by purchase, he must be heir as well as male, (and in this case till his mother's death, *Isaac Winter* was not heir): the other, quod nemo est hæres viventis; and if either of these rules is to prevail in this case, it will bar *Isaac Winter's* claim. The first rule is certainly not universal; it has many exceptions, and in most of the instances in which it has prevailed, the very heir has not been (as here) *lineal* ancestor of the person who claims as heir male; but the question has most frequently arisen between *collaterals*; the person claiming as heir male has been *presumptive* heir male only, not heir male *apparent*, so that another person might afterwards be born who would answer the whole description of heir and male, and it never has prevailed where it is evident upon the instrument containing the limitation, that the presumptive heir male was the person intended. Indeed, where the limitation

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is so far specific as to shew clearly that the first male descendant in a given line is first intended, the second next, and so on, and the ancestor is to take nothing, it should seem to be immaterial whether the ancestor continues in esse or not; and the male descendant should be allowed to take, whether his ancestor is dead, so as to make him *perfect heir*, or living, so as to make him *heir apparent* only. In the leading case of *Counden v. Clark* (a), *Hil.* 10. *Jac.* 1. where the devise was to the right heirs males of the posterity of testator and of his name, the claim was by testator's brother, against the grand-daughters of the testator; and besides the objection that he was not heir male of the body of the devisor, which according to Lord *Ossulston's* case (b) is essential, he was heir male presumptive only, for if either of the grand-daughters had had a son, that son would have been right heir male. So in *Ashinhurst's* case (c), the claim seems to have been by a collateral heir of the devisor, against the daughters of the devisor, and a son of any of these daughters would have been right heir male. The case put in argument in 1 *Co.* 109 b. "that upon a devise to the heirs male of the body of *J. S.* if *J. S.* has two sons, and the elder dies in the life-time of *J. S.*, leaving a daughter, and then *J. S.* dies, the younger son shall not have the land," is open to the same observation, for the younger son is heir male *presumptive* only; if the grand-daughter, the elder son's daughter, were to have a son, he would be heir male, he would have both the qualifications of being heir and male. In *Anon. Palm.* 50. *M.* 17 *Jac.* testator devised to his executors till they could raise 1000*l.*, and then

(a) *Hob.* 29. *Jenk.* 294.(b) 3 *Salk.* 336. 11 *Mod.* 189. *Palm.* 50.(c) *Hob.* 54.

willed

willed that his heirs male should have the land ; he left a brother and a daughter, and when the 1000*l.* was raised, the brother claimed the land, but his claim was disallowed, because he was not heir as well as male ; but there had the daughter had a son, that son would have been heir male. So in the case put in *Co. Litt.* 24*b.* of a remainder to the heirs female, of a man who has issue a son and daughter, the daughter cannot take as heir female, for if the son were to have a daughter, she would be heir female of the body of the father. In *Dawes v. Ferrars* (a), the devise was to the devisor's right heirs male for ever, his brother's son filed a bill against his grand-daughter, for the title deeds and to stay waste ; and a demurrer to the bill was allowed, because he was not heir male of the body of the testator, and because though male he was not heir, for if the grand-daughter were to have a son, that son would be heir male. A bill of review was afterwards brought by the heirs at law of the brother, against the grand-daughter's assignee, and on case to B. R. they certified it as their opinion, that the plaintiffs were not entitled to the estate, because they conceived the testator's brother could not take by the description of right heir male of the testator, *Gwyn v. Hooke*, 1st February 1743 (b). In Lord Ossulston's case, the claimant was testator's brother, and he claimed against testator's daughter ; and her son, were she to have any, would have been right heir male. In all these instances the *real heir* has been a *collateral* of the person claiming as heir male, not his *lineal ancestor* ; and in each of them a person might thereafter have come in esse,

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(a) 2 P. Wms. 1. Prec. in Ch. 589.

(b) 8 Fin. Abr. 317. tit. Devise, (W b.)

who

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who would have answered the description of "heir male," by being both heir and male. I will now refer to cases where the rule has been prevented from applying, because it was apparent, upon the face of the instrument in which the limitation was contained, that it was the intention that the special heir male, the heir male *presumptive*, though not heir general, should take. In *Couden v. Clark*, Lord Hobart says, it will go to the *very heir*, because *no other sense appears* to the Court, but he admits, that if a contrary intent did appear, it would prevail. In *Vent.* 381, Lord Hale mentions this case: "A man having three daughters gave them 2000*l.*, and devised his land to his heir male," and provided, that if his daughters "troubled his heir," the gift to them of the 2000*l.* should be void. He had no son, and his nephew was the heir male presumptive; and it was resolved that his nephew should have the land, though he was not strictly heir, as well as male, because the testator evidently pointed to his heir male presumptive; and his daughter's sons, who would have been his regular heirs male, were out of his intention. In *Brown v. Barkham* (a) (which was the case of a trust) a conveyance was decreed to the heir male presumptive, the special heir male, because that appeared the intention; and in *Wills v. Palmer* (b), the special heir male, though not heir general, was held entitled upon the same ground. Inasmuch, therefore, as in this case the *very heir* is not collateral to, but the lineal ancestor of the claimant, inasmuch as the claimant is not heir male presumptive, but heir male apparent, and no preferable heir can ever come into esse, and inasmuch as the intention is, as it seems to

(a) *Prec. in Ch.* 442. 460. *Co. Litt.* 24*b.* n. 3.

(b) 5 *Burr.* 2615.

me, apparent upon this devise, that the first and nearest male descendant of the eldest sister, if there should be any in time, should take, I am of opinion that the first of the rules I have mentioned will not prevent the claim of *Isaac Winter*. As to the second rule, “quod nemo est hæres viventis,” if I am right in supposing, that by the *first male heir* in this case, is to be intended the first, according to the seniority of the several daughters of *Richard Chilcott*, there are several authorities which induce me to think it immaterial whether the mother is dead, so as to make the claimant perfect heir, or living so as to make him heir apparent only. And if the rule “quod nemo est hæres viventis” were applicable here, the devise in favor of *Richard Chilcott’s* branch would altogether have failed, had the testator’s widow made no devise in favour of her sister *Eleanor*, so as to postpone the time when *Richard Chilcott’s* branch was to take; because, at her death, all *Richard Chilcott’s* daughters were living; or had *Eleanor* died before any of those daughters the same consequence would have followed. In *Farrington v. Derel* (a) the testator devised to his widow for life, remainder to his son *John* in tail male, remainder to his own next heir male in tail male; testator died, *John* died without issue, the widow died, and the daughter of testator’s daughter, being his heir, entered and enfeoffed plaintiff; the granddaughter afterwards had a son, who entered as testator’s next heir male, and enfeoffed defendant; the granddaughter was still living. A special verdict was found, and it was twice before the Court and much debated; and *Newton* said, the first time it was before the Court, in 9 H. 6.,

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(a) 9 H. 6. 23. 11 H. 6. 12.

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Don dec.
Willm
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that the great grandson was heir male by force of the gift, though his mother was in full life; and though this was denied by *Paston*, in 11 H. 6. it was reasserted by *Cotton*; and the chief point discussed was, whether the great grandson was not born too late to make a valid claim, his birth not occurring until after the death of the tenant for life; and this, according to *Hob.* 33. and *Bro. Abr. Dev.* 5., was the great question in the case. No decision is reported, but I think it may be taken for granted, that the mother's being in full life was not considered a clear objection to her son's claim; for had it been so the case could hardly have undergone the discussion it did. In *James v. Richardson* (a), and in *Burchett v. Durdant* (b), both of which cases arose upon the same will, a devise in remainder to the heirs male of the body of *R. D. now living*, and to such other heirs male or female as he shall hereafter have of his body, was held to vest in *R. D.*'s eldest son, in the lifetime of *R. D.*, so that that son must have been considered as answering the description of the *heir male* of his father, whilst his father was living; and had that son died without issue in his father's lifetime, leaving a brother, no doubt it must have been held, as a consequence of that decision, that the estate would immediately have vested in that brother, notwithstanding his father was alive. The first of these cases was decided in the House of Lords, and the second was afterwards decided in the B. R. and the Exchequer Chamber. I am aware that great stress was laid in those cases, upon the words *now living*, on the ground that those words imported that the testator considered them as filling the character of heirs within

(a) *T. Raym.* 330. *Pollex.* 457. *T. Jun.* 99. 1 *Vent.* 334.

(b) 2 *Vent.* 311.

the

the meaning of his will, though their father was living ; but I can see no reason why the word *heir*, upon this will, may not be considered as including the heir apparent, notwithstanding his mother is alive ; it being clear she was not to take. And this testator knew that each of the daughters of *Richard Chilcott* was living when he made his will, as the testator did in *James v. Richardson* and *Burchett v. Durdant*. *Darbison v. Beaumont* (a) is another authority upon the same point. In that case there was a devise in remainder to the “ heirs male of the body of my aunt, Mrs. *Elizabeth Long*, wife of *Richard Long*, clerk, lawfully begotten, and for default of such issue to testator’s right heirs,” the will gave Mrs. *Long* a legacy, and named her three sons ; so that testator considered her living, and knew that she had three sons. The eldest of these sons brought ejectment under this devise against testator’s heir ; and, *Elizabeth Long* being still alive, the defence was, that her son could not claim as heir male of her body ; but, after great debate and consideration, the Exchequer (except *Bury B.*) held that he might ; and though their judgment was reversed by the two Chief Justices, it was affirmed unanimously in *dom. proc.* The printed reasons urged in the House of Lords were, that in this will the words *heirs male of the body of E. L.*, designated who the persons intended were ; and that an heir apparent was sufficient heir to answer the description in this case. This point was again under consideration in *Goodright v. White* (b). A remainder was there limited to the heirs male of testator’s son, and to the heirs of one of his daughters.

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(a) *Fort.* 18. 1 *P. Wms.* 229. 1 *Bro. P. C.* 489.

(b) 2 *B. Bl.* 1010.

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The son and daughter were both noticed by the will as living; and the daughter being living when the particular estate ceased, the question was, whether her son could take in her lifetime, under the description of her heir; and the court of C. P. decided that he might. *De Grey* C. J. noticed, that 200 years ago it might have been thought not sufficient; because the description is not legally and technically true; but within a century a more liberal construction of a testator's words has prevailed, and they have been generally taken in their popular sense, which is most likely to have been his meaning; and he refers to *James v. Richardson*, *Long v. Beaumont*, and *Brown v. Barkham*. Upon these authorities, inasmuch as it appears to me, upon the face of this will, that the testator meant the male descendants of *Richard Chilcott* to take, according to their proximity to *Richard Chilcott*, and the seniority of their lines, without reference to the question whether their mothers were living or not, and that the life or death of the mothers was foreign to the apparent intention of the testator, I am of opinion that *Isaac Winter* is entitled to recover, as being the son of the eldest of his daughters who had a son, and as, therefore, filling the character of his first male heir; and if I am right in this, there ought to be judgment for the lessor of the plaintiff, in that ejectment which is brought on his demise, and judgment for the defendant in the other ejectments.

Judgment for the lessor of the plaintiff on the demise of *Catherine Viney*. For the defendant in the other ejectments.

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Sir C. HAGGERSTON, Bart., *against* HANBURY
and Another.

THE following case was sent by the Master of the Rolls for the opinion of this court. By indenture dated 10th October 1721, the hereditaments and premises in question in this cause were demised to certain persons, their executors, administrators, and assigns, for the term of 300 years from the date of the said indenture, upon certain trusts. In April 1780, Sir C. Haggerston was tenant in tail male in possession of all the said hereditaments and premises, subject to the said term of 300 years, which term of 300 years was then standing in the said trustees. By indenture dated 14th April 1780, duly made and executed by and between the said Sir C. Haggerston, of the first part, J. Leteney and S. Burke, of the second part, and J. Silvertop, of the third part, it was witnessed that for barring, docking, and extinguishing all estates tail, and all reversions and remainders thereupon expectant, of and in the manors and hereditaments therein mentioned, and for limiting the same unto and to the use of the said Sir C. Haggerston, his heirs and assigns for ever; and in consideration of 10s. to Sir C. Haggerston paid by J. Leteney and S. Burke, he, the said Sir C. Haggerston, did grant, bargain, and sell unto J. Leteney and S. Burke, and to their heirs and assigns, the said hereditaments and premises, and the reversion and reversions, remainder and re-

Sir C. H., tenant in tail, in possession, of certain hereditaments and premises, subject to an outstanding term, by indenture, in order to bar the estate tail, and all remainders expectant thereupon, and to limit the same to himself in fee, and in consideration of 10s., granted, bargained, and sold the said hereditaments and premises, and the reversion, &c. thereof to A. and B., their heirs and assigns, to hold to them, A. and B., to the use of A., that he might become tenant of the freehold of the said premises, in order to suffer a recovery. The deed was afterwards duly enrolled as a bargain and sale: Held, that it operated as a grant of the reversion to a good tenant of

A. and B., and that A. became solely seised of the premises, so as to be a tenant of the freehold of the entirety.

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mainders yearly, and other rents, issues, and profits, and all the estate, right, title, interest, use, trust, property, claim, and demand at law and in equity, of the said Sir *C. Haggerston*, of, in, and to the said hereditaments and premises, and every part and parcel thereof, with the appurtenances. To hold the same unto *J. Leteney* and *S. Burke*, their heirs and assigns, to the use of *J. Leteney*, his heirs and assigns for ever. To the intent that he might become perfect tenant of the freehold of the said premises, in order to suffer a common recovery thereof, and that the said recovery should enure to the only proper use and behoof of Sir *C. Haggerston*, his heirs and assigns for ever. In *Easter* term 20 *G. 3.*, a recovery of the premises in question was suffered, wherein *J. Silvertop* was demandant, *J. Leteney* tenant, and Sir *C. Haggerston* vouchee. The said indenture of the 14th *April* 1780 was, after the return of the writ of seisin, duly inrolled as a bargain and sale within the statute of the 27 *H. 8. c. 16.* The question for the opinion of the Court was, whether *J. Leteney* became solely seised of the said hereditaments and premises comprised in the said indenture of the 14th *April* 1780, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the said hereditaments and premises.

Tinney for the plaintiff. By the deed of *April* 14th, 1780, *Leteney* became solely seised of the premises therein mentioned. Sir *C. Haggerston* thereby granted, bargained, and sold unto *Leteney* and *Burke* the hereditaments and premises, and the reversion, &c. Now those words are sufficient, and are apt words to pass to the reversion by way of grant, and the intent that they should

so operate is plain, for the use is limited to *Leteney* alone to make him perfect tenant to the præcipe, which could not be if the deed were to operate as a bargain and sale. It is a very old maxim that Judges should be astute in discovering and giving effect to the intent of parties, *Earl of Clanrickard's case* (a). According to a great variety of decisions, that maxim appears to have been constantly acted upon for a long series of years. *Crossing v. Scudamore* (b), *Osman v. Sheafe* (c), *Roe v. Tranmer* (d), *Skove v. Pincke* (e), are all instances where deeds incapable of operating strictly according to the words were so construed as to be made operative according to the intent of the parties. There is not, however, any case completely in point as an authority for the present; for in each of those cases the deed would have been wholly void if taken according to the letter. The mere introduction of the words "bargain and sale" is not sufficient to make the deed operate as a conveyance taking effect by the statute of uses, and not as a common law grant of the reversion. If it were so, the ordinary conveyance to uses by lease and release would be rendered bad, for in almost every release, the words "bargain and sale" are introduced. No one will contend that the enrolment of such a deed would vest the legal estate in the releasee to uses. There are two principles of construction applicable to this case, which make it clear that the deed operated as a grant of the reversion. First, that where a deed may operate to pass land either by the common law or by the statute, it shall be held to operate at common law, *Co. Litt.* 49 b. A rule which

(a) *Hob.* 277.(c) 3 *Lev.* 370.(e) 5 *T. R.* 124.(b) 1 *Mod.* 175. 2 *Lev.* 9.(d) 2 *Will.* 75. *Willes*, 682.

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has not been overturned, though it is not now allowed to prevail against the apparent intent of the parties, *Barker v. Keat (a)*, *Roe v. Tranmer*. Secondly, where a deed in one way passes land by itself, without any further act, it shall be held so to operate, rather than in any other mode to the perfection of which some further act is necessary, *Barker v. Keat (a)*, *Lutwich v. Mitton (b)*. And in an anonymous case, 3 *Leon.* pl. 39. p. 16., it was expressly held that a deed must operate in that way in which it first had full effect. Now if the deed in question be held to operate as a grant of the reversion, the estate passes immediately. If it be a bargain and sale, enrolment is necessary to make it valid. These rules, in addition to the apparent intent of the parties, make it incumbent on the Court to decide that the deed was in effect a grant of the reversion; and then the use would be executed in *Leteney* alone, so as to make him a good tenant to the præcipe of the entirety of the lands. The doctrine of election cannot affect this case, inasmuch as the grantees were not to take any beneficial interest.

Cresswell contra. The words of the deed in question are properly those of a bargain and sale; and that the parties so considered them is manifest from their having enrolled the deed as a bargain and sale. At that time, therefore, they must have intended that it should so operate; and it cannot now be held to have a different operation, although as a bargain and sale it would not carry into effect the whole object of the parties to the deed. *Tyrrell's* case (c) is a strong authority to this point. *Jane Tyrrell*, widow, for the sum of 400*l.* paid

(a) 2 *Mod.* 250.(b) *Cro. Jac.* 604.(d) *Dyer*, 156. a.

by *G. Tyrrell*, her son and heir apparent, by indenture enrolled in Chancery, bargained, sold, gave, granted, covenanted, and concluded to *G. T.* all her manors, lands, &c., to have and to hold the said, &c. to the said *G. T.* and his heirs for ever, to the use of the said *Jane* for life, &c. And it was held that the limitation of uses upon the habendum was void, because an use cannot be declared upon an use. Now it is clear, that the deed might have operated as a covenant to stand seised, and then the limitation of uses would have been good; nor can it be doubted that the parties (at all events the grantor) intended that the use should be well limited to herself for life. But as it appeared to have been the intention that the deed should take effect as a bargain and sale, and it had accordingly been enrolled, it was held so to operate, although the uses were thereby defeated. There are no such principles of law as those stated on the other side, and which are supposed to govern this case. The passage referred to in *Co. Litt.* 49. *b.* is this: "When a man hath two ways to pass lands, and both of the ways be by the common law, and he intendeth to pass them by one of the ways, yet, ut res magis valeat, it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and settling it by the statute, there, in many cases, it is otherwise." Lord *Coke* does not there mean to say that a conveyance at common law is to be preferred to one taking effect by the statute, but that a common law conveyance cannot, ut res valeat, operate as a conveyance to uses, or a conveyance intended to have effect under the statute, operate at common law. And even this distinction is now at an end, *Roe v. Tranmer*. The next principle of law which is supposed

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posed to be favorable to the present plaintiff is, that where a deed is capable of a two-fold operation, but according to one construction takes effect immediately, without the performance of any further act, it shall be so construed, rather than in a mode which renders such further act necessary to its validity; and *Barker v. Keat*, and *Lutwich v. Mitton*, and *Anon. 3 Leon.* were cited as instances. Now in each of those cases the deed was held to operate as a bargain and sale, that being a conveyance by which the land passed immediately; and it is clear from other authorities that a bargain and sale takes effect from the time of the execution, although it may afterwards be rendered void by a neglect to enrol it within the time prescribed by the 37 *H. 8. c. 16*. The whole question, therefore, turns upon the application of the rule of law given in *Co. Litt. 49 b.*, and *Shep. Touch. 83.*, that "if a man have two ways to pass lands, and he intends to pass them one way, and they will not pass that way, *ut res valeat*, they may pass the other way." Now here it appears to have been the intention to pass these lands by bargain and sale to *Leteney and Burke*; that the reversion might so pass is clear from *Fox's* case (a), although the limitation of uses would be void. The first part of the rule is, therefore, inapplicable; and indeed it has been admitted, that in all the cases upon this point, the deed, if taken according to the letter, would have been wholly void; and it may also be observed, that in each of them the construction put upon the instrument was against the grantor; that which is now contended for is in his favor. Neither was it originally necessary to construe this deed as a grant of

(a) 8 Co. 105.

the reversion in order to carry into effect the main object of the parties. That object was to make a tenant to the præcipe to suffer a recovery. If the deed operated as a bargain and sale, *Leteney* and *Burke* would be joint-tenants, and the writ might have been against them jointly. Suppose *Leteney* to have died before the recovery, and a writ to have been issued against *Burke*, it could hardly have been contended that this deed had not the effect of vesting the estate in him as the survivor of two joint-tenants, so as to make him a good tenant; and if so, it must have operated as a bargain and sale; to say now that *Leteney* was tenant of the whole, is to say that the deed might at the same time have a two-fold operation. The point now raised has never yet been decided, and Mr. *Preston*, in his edition of *Sheppard's Touchstone*, 83., makes this observation upon it: "It is far from being clear that a deed, though enrolled, and capable of effect as a bargain and sale, may not be pleaded as a grant, so that uses may arise from the person or estate of the grantee." At all events, therefore, the defendants have good ground for saying that it is far from being clear that it can be so pleaded.

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The following certificate was afterwards sent:

This case has been argued before us by counsel, and we are of opinion that the said *John Leteney* became solely seised of the said hereditaments and premises comprised in the said indenture of the 14th April 1780, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the said hereditaments and premises.

J. BAYLEY.

G. S. HOLROYD.

J. LITLEDALE.

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WILLIAMS *against* JONES.

An attorney entered into a written contract, whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted, no time was expressly fixed for the commencement of the partnership: Held, that no time being expressly appointed, the partnership commenced from the date of the agreement; that parol evidence was properly admitted to shew that the person taken into partnership was not an attorney at the time when the agreement was executed; but that it could not be received to shew that the agreement was not to take effect until he should be duly admitted, for that would make the agreement different from that which it purported to be; viz. an agreement for a present partnership.

ASSUMPSIT upon an agreement, dated 11th November 1822, whereby plaintiff, "in consideration of 250*l.* paid by the defendant, and of 100*l.* to be paid by defendant within two years from the date thereof, agreed to take *T. Jones*, the defendant's son, into partnership with him, as attornies and solicitors, and to give him a moiety of the profits of the partnership, and of the profits arising from the hundred court of *Werrall*, of which the plaintiff was lord, and a moiety of the royalties." The partnership to continue for ten years. Breach, non-payment of the 100*l.* Plea, non-assumpsit. At the trial before *Warren C. J.* of *Chester*, at the Spring assizes, 1825, for that city, the plaintiff proved the agreement as set out in the declaration, but it appeared by the cross-examination of his witnesses that the defendant's son was not admitted an attorney until April 1823. For the defendant it was contended, that the agreement was illegal, as constituting a partnership between an attorney and a person who had not at that time been admitted. For the plaintiff evidence was offered that the agreement was not put in force before the admission of the defendant's son. The learned Judge thought the evidence inadmissible, and directed a nonsuit. In *Easter* term a rule nisi for a new trial was granted, and now

Cross Serjt. was called upon to support it. No time being fixed for the commencement of the partnership, it was open to the plaintiff to give parol evidence upon that

that point. The contract, upon the face of it, was perfectly legal, the defendant sought to impeach the legality of it by parol evidence that the defendant's son was not at the date of the contract an attorney; it was, therefore, but reasonable that the plaintiff should be allowed by testimony of the like nature to answer the presumption of illegality so raised, by shewing that the agreement was not to take effect until after the party had been duly admitted. The agreement contains reference to the date, in order to fix the time of payment, but no such reference is made to point out the commencement of the proposed partnership.

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BAYLEY J. Where a written contract has been entered into, the Court must look to that in order to ascertain the meaning of the parties; and we are not at liberty to admit the introduction of parol evidence to shew that the agreement was in reality different from that which it purports to be. The declaration in this case describes the contract as forming a partnership to commence in præsentī, and as made between parties, then attorneys, and the agreement corresponds with the description given in the declaration. It is described as an absolute contract, but it is now contended that it was conditional, to commence in futuro, *if T. Jones* should be admitted an attorney. But it is impossible to put such a construction upon it. Here, then, there was a bargain giving a present share of the profits of an attorney's business to a person not admitted; that was illegal, according to the 22 G. 2. c. 46. s. 11.; and even if the evidence had been admissible, to shew that the agreement was to take effect in futuro, the agreement as proved would not correspond with the description of it

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it in the declaration, and on that ground the nonsuit would be right. This rule must, therefore, be discharged.

HOLROYD J. I am of opinion that the nonsuit in this case was right. Whatever may have been the intent of the parties, which I collect to have been that the instrument should take effect immediately, at all events the law gives it that effect, no time for its commencement being mentioned in the instrument. Parol evidence was properly admitted to shew that the agreement was illegal, but not for the purpose of varying the contract, by adding to or diminishing from it. It is contended for the plaintiff that evidence should have been admitted, which certainly would have shewn the contract not to be illegal, but would at the same time have shewn it to be different from the legal import of the instrument declared upon. If the evidence had merely gone to rebut the illegality, I should have thought it admissible; but it went further, and then two objections arose to it; first, it went to shew that an agreement apparently absolute was really conditional; secondly, its effect was to add by parol to an agreement, which, according to *Boydell v. Drummond* (a) could not be valid, unless in writing, inasmuch as it was not to be performed within a year from the making of it.

LITTLEDALE J. concurred.

Rule discharged.

D. F. Jones was to have opposed the rule.

(a) 11 *East*, 142.

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DOE on the joint and several Demises of
EDWARD RAWLINGS, JOHN TASKER, MARY
PINCKE, Widow, SARAH NETTLEFOLD, ABRA-
HAM NETTLEFOLD, and ROBERT SKILL, against
T. WALKER, J. JENNINGS, and R. SUTHERDEN.

EJECTMENT to recover premises in the parishes of
Dartford and Wilmington, in Kent. Plea, not guilty.

At the trial before *Alexander C. B.*, at the Spring assizes for the county of *Kent* 1825, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case.

Thomas Williams being seised in fee of the premises in question, by his last will and testament duly executed and attested so as to pass real estates, devised the premises in question unto his nephew *John Williams*: "to hold the same unto and to the use of his nephew *John Williams* and his assigns, for and during the term of his natural life; and from and after his decease, unto and to the use of *John Williams* and *Thomas Williams*, the two sons of his said nephew *John Williams*, their heirs and assigns for ever, as tenants in common and not as joint tenants." The said *Thomas Williams* by indenture of lease of the 17th *December* 1799, then made between him and his nephew *John Williams*, demised to the said *John Williams* the premises in question, to have and to hold the same unto the said *John Williams* from *Michaelmas-day*, which would be in the year 1809, "when the then present lease of the said premises to

A. was lessee of premises for a term of twenty-one years, which would expire at *Michaelmas* 1809. In *December* 1799 *A.* took a further lease of the same premises for sixty years, to commence from *Michaelmas* 1809. The lessor died in *December* 1800, and devised the premises in question to *A.*, the lessee, for his life. By lease and release *A.*, in 1806, conveyed his life estate to *B.* Held, that *A.*'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life.

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the said *John Williams* will expire," for and during the full end and term of sixty years from thence next ensuing, and fully to be complete and ended, yielding to the lessor and his heirs and assigns the yearly rent of 60*l.* *John Williams* took down the two houses demised to him by the lease of 1799, and on the site of them built a new brick messuage at a considerable expence. At the time of making such lease, the said *John Williams* was in possession of the premises by virtue of a lease thereof for a term of twenty-one years from *Michaelmas* 1788, which would expire at *Michaelmas* 1809, at the yearly rent of 60*l.* The testator, *Thomas Williams*, died without revoking or altering his will, and his nephew *John Williams* took possession of the premises devised to him for life, and from that time until his death, which took place in *August* 1823, continued in possession of the said demised premises, without paying any rent under either of the said leases. *John Williams*, (the son of the said *John Williams* who was nephew of the testator) one of the devisees in remainder, died intestate without issue, leaving his brother *Thomas* his heir at law him surviving. The case then set out several conveyances, from which it appeared that the interest of *Thomas Williams* in the premises in question had vested in the lessors of the plaintiff. It further appeared, that by deeds of lease and release of *May* 1806, *John Williams* conveyed his life estate to *James Parker*, to the use of *James Parker*, his heirs and assigns, for the life of *John Williams*, and in trust for the said *John Williams*. Upon the death of *John Williams*, the tenant for life, in *August* 1823, the lessors of the plaintiff claimed the possession of the premises in question, as deriving title to the same from the said *Thomas Williams* the surviving remainder-

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man in fee, and on the ground that the said term of sixty years was no longer subsisting. This case was argued at the sittings in Banc after last *Trinity* term by

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Chitty for the lessors of the plaintiff. The lease for sixty years, which was to commence in 1809, was merged in the life estate which *John Williams* took by devise under the will of *Thomas Williams*. It is clear that he accepted the estate devised, for he paid no rent during his life. There can be no doubt that the lease in possession merged, but it will be said that the lease in reversion being a mere *interesse termini*, did not merge. *Salmon v. Swann* (a) is an authority to shew that such an interest will merge. There *A.* seised in fee, demised to *B.* for 100 years to begin at a future time; and before that time made a lease to *C.* for twenty-one years, to begin presently. *B.*, before the commencement of his term, assigned it back to *A.*, who afterwards granted a rent charge, for which the grantee distrained upon *C.* The question was, whether the future term was merged in the inheritance, or if it had any existence in *A.*, so that he might thereout grant the rent; for then it would avoid the second lease, being prior to it, and by consequence be liable to the payment of the rent-charge. It was resolved, that the first term was merged. But *Colbourne* and *Mixstone's* case (b) is an authority expressly in point to shew, that an *interesse termini* will merge in a life estate devised to the lessee. There *H. Leigh* being seised of a house called the *Marygold*, and two other houses in *London*, leased the said two houses to one *Alice Cheape* for twenty-one

(a) *Cro. Jac.* 619.(b) 1 *Leon.* 129.

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years if she should live so long, and afterwards made a lease in reversion of the said two houses to *Alice Leigh* for twenty-one years, and afterwards he devised these two houses, and also the house called the *Marygold*, to the said *Alice Leigh* for her life to bring up his children, and died; after his death the said *Alice Leigh* entered into the house called the *Marygold*, and took the rents and profits of the said two other houses for seven years by virtue of the said will; and it was held that the lease for twenty-one years was merged in the estate for life. That case is expressly in point, and must govern the present.

Bolland contra. *John Williams's* interest under the second lease was a mere *interesse termini*; he had not any actual term, but a right to have a term at a future time, by entry when that period should arrive, *Co. Litt.* 46. b., *Bacon's Abr.*, tit. *Leases*, 6 Ed. 185. 216. *Heming v. Brabason* (a). Such an interest, not being an estate, does not prevent or cause merger, *Dyer* 112. *Whitchurch v. Whitchurch* (b). It is incapable of being surrendered, 1 *Bridgman*, 7. It cannot be the foundation of a release from the lessor, *Co. Litt.* 270. a. b. *Barker v. Keat* (c), *Shepherd's Touchstone*, 324. It is not affected by any tortious act, as abatement, intrusion, or disseisin, *Bruerton v. Rainsford* (d), *Saffyn's* case (e). Now merger is a surrender in law, producing the same effect as a surrender in fact would have produced. Then an *interesse termini* not being capable of being surrendered, cannot be merged, *Com. Dig.*, tit.

(a) *Bridgman's Reports*, by *Bannister*, p. 6.

(b) 2 P. Wms. 236.

(d) *Cro. Elys.* 15.

(c) 2 Mod. 250.

(e) 5 Rep. 124 b.

Surrender (E.) *Shep. Touch. tit. Surrender*, p. 303. The interest, therefore, under the lease, which was to commence in 1809, did not merge in the life estate. Neither was it extinguished. Extinguishment by operation of law is the legal consequence of an actual union of something issuing out of and constituting part of the profits of the land, (as common, rents, or other rights,) with the immediate ownership of the land itself, the existence of both interests in one person, at one and the same time, being inconsistent. *Vin. Abr. tit. Extinguishment* A. pl. 18, 19., C. pl. 14. 33. 43., F. 16. Now here there was no inconsistency in the existence of a life-estate, with a right at a future time to have an estate which might exist longer than the life-estate, and which might not arise till the life-estate had ceased. The case of *Salmon v. Swann* (a) only decided that the assignment of an *interesse termini* to the reversioner would not defeat an interest which he had created anterior to the acquisition of the *interesse termini*. There a person seised in fee in possession, subject to this future interest, granted a lease for twenty-one years before, and a rent charge after, the purchase of the *interesse termini*, and it was held that the lease should prevail over the rent. It is true that the Court talked about the future term being drowned in the inheritance. But it is observed by Mr. *Preston*, in his treatise on *Conveyancing*, vol. 3. p. 125., that although in the report the language of the Court be applicable to merger, it must be read as referring only to extinguishment. Now taking it in that sense, there cannot be a doubt that such an interest might at any time be

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(a) *Cro. Jac.* 613.

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extinguished by the act of the parties. It may be released to any person having an estate in the reversion, and to the extent of that estate will the release operate to the extinguishment of the future term. The *owner* of that estate having created interests out of it, could not by purchasing the *interesse termini*, defeat the interest he had so created. His purchase would enure for the benefit of the persons in whose favour he had created such interests, and that could only be by the law's considering that the interest so purchased by him, which, if not extinct, would have defeated the interests of his grantees, was extinguished in the estate out of which these latter interests were created. The decision in *Salmon v. Swann* does not apply to this case, where the freehold comes to the person having the *interesse termini*, not by his own act, but by *devise*. The lessee could not, before the future term arose, alienate his life interest, and then set up the term against that alienation. If the term had come in *esse* during the life, and the life-estate had been still vested in the termor, a merger would have taken place; but the question in this case was whether anterior to the term taking effect in possession, the future right was extinguished, and if extinguished, whether the extinction was partial or total. Applying the principle of *Salmon v. Swann* to this case to its utmost extent, the acceptance of the devise would extinguish the *interesse termini* so far only as it was inconsistent with the life-estate, but in this case there was no inconsistency, for the life-estate might have ceased before the term arose, and when the term arose the life-estate was vested in another person. At no period, therefore, has there been a concurrence of estates so as to constitute a merger, or a
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concurrence of a right with an estate so as to occasion an extinguishment. *Colbourne* and *Mixstone's* case (a) is relied upon as an authority to shew that *John Williams's* interest in this lease was merged or destroyed by his acceptance of the devise. But the facts of that case are mis-stated in the report in *Leonard*. It appears by the record that *Alice Leigh's* interest in two of the messuages was concurrent at the time when she took the life-estate. Her interest in the term at that time was a subsisting interest, not an *interesse termini*, it therefore merged in the life-estate. The case of *Colbourne* and *Mixstone*, therefore, as explained by the record, is not an authority in point.

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Cur. adv. vult.

The judgment of the Court was now delivered by

BAYLEY J. This was an action of ejectment, and the single question presented to our consideration upon the argument in *July* last was this, whether a term for years created in *December* 1799, to commence from *Michaelmas* 1809, was annihilated by a life estate devised to the lessee in *January* 1799, and merged in such life estate, the life estate being conveyed away by the lessee before *Michaelmas* 1809, so as to prevent the lessee from having both estates by way of present interest at one and the same time. The facts as to this point were very short. In *January* 1799, *Thomas Williams*, the owner in fee, devised to *John Williams* for life. The premises were at that time under lease to *John Williams* for a term which would expire at *Michaelmas* 1809. Before he died, viz, in *December* 1799, the testator made

(a) 1 *Leon.* 129.

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a further lease to *John Williams* for sixty years from *Michaelmas* 1809. The testator died in *December* 1800. By deeds of lease and release of *May* 1806, *John Williams* conveyed his life estate to *James Parker* to the use of *James Parker* his heirs and assigns, for the life of *John Williams*, and in trust for the said *John Williams*. *John Williams*, therefore, had the legal estate for his own life from *December* 1800 to *May* 1806, when he passed away the legal estate to *Parker*; and the question is, whether his interest under the lease of *December* 1799 was merged in that his legal estate. His interest under the lease of *December* 1799 gave him no right of possession during any part of the time that he had in himself the legal estate for his own life; it gave him only a species of what the law calls an *interesse termini*, a right to have the possession at a future time, viz. at *Michaelmas* 1809; and when the nature of an *interesse termini* and the principle of the doctrine of merger is considered, we shall have no difficulty in coming to the conclusion that in this case there was no merger. The right upon a lease to commence in *presenti* is, (except under the statute of uses,) until entry an *interesse termini* only, and so is the right upon a lease to commence in *futuro*; and the same rules are applicable to both. Each is a *right* only, not an *estate*. The whole *estate*, notwithstanding such right, is in the lessor. In neither case will a conveyance by the lessee to the lessor operate as a surrender, nor will a release from the lessor to the lessee operate by way of enlarging the estate. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate; and the lessee may extinguish it by a release to the lessor, but it has all the properties and consequences of
a right

a right only, not of an estate. Upon an ordinary lease, to commence instanter, the lessee has at common law an interesse termini only till entry, *Co. Litt.* 46 *b.*, a release to him before entry, to increase his estate, is not good, *Co. Litt.* 46 *b.*, 270 *a.*, nor can the lessor grant away the estate by the name of the reversion, for before possession by the lessee there is no reversion in the lessor, *Co. Litt.* 270 *a.*; nor can the lessee surrender the term; and in the case of a lease to commence in futuro, all the common law rules of an ordinary lessee before entry apply. He cannot surrender because he has a right only, not an estate, and a right only cannot be surrendered, and there is no reversion in which this may drown, *Co. Litt.* 338 *a.*, and Lord *Coke* puts this case distinctly, to illustrate the difference in effect in certain cases, between a surrender in fact and a surrender in law; for he says, "If a man make a lease for years to begin at *Michaelmas* next, this future interest cannot be surrendered, because there is no reversion wherein it may drown; but by a surrender in law it may be drowned. As if the lessee before *Michaelmas* take a new lease for years, either to begin presently, or at *Michaelmas*, this is a surrender in law of the former lease." In *Sheppard's Touchstone*, 324. it is laid down distinctly, that a release to him, cannot enure by way of enlargement, because he has no estate. "If the release be before the term begin, or after the term begin, but before the lessee hath entered, though it may be good to extinguish any rent reserved on the lease, it is not good to enlarge the estate." So, *Co. Litt.* 270 *a.* "Before entry the lessee hath but an interesse termini, an interest of a term, and no possession, and, therefore, a release, which enures by way of enlarging an estate,

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cannot work without a possession, for before possession there is no reversion. But if a man make a lease for years to begin presently, reserving a rent, if before the lessee doth enter, the lessor releases all the right that he hath in the land, albeit this release cannot enlarge his estate, it shall, in respect of the privity, extinguish the rent." But an *interesse termini* may be granted away or released. *Co. Litt.* 46 b. Now, what is the doctrine of merger, and the principle upon which it is founded? *Blackstone*, in 2 *Comm.* 177. describes it as occurring, when a greater and a less estate coincide and meet in one and the same person, without any intermediate estate, and he puts as an instance where tenant for years obtains the fee. *Bacon*, in his *Abridgment*, tit. *Leases*, (R.) describes it as occurring where there is an union of the freehold or fee and a term for years, in one person at the same time, in which case the greater estate merges and drowns the latter, because they are inconsistent and incompatible; and Mr. *Preston* describes it as the conclusion of law on the union of *two estates*. Apply any of these descriptions to this case. There must be an union of two estates, here there is no such union. The *interesse termini* does not acquire the character of an estate, until the legal interest in the life estate is passed away. Instead of two estates having been in *John Williams* at the same time, he had never in him more than one estate. He had nothing but the life estate till *Michaelmas* 1809, and nothing but the term after that period. Then where is the inconsistency or incompatibility which is essential to constitute a merger? Where a man, but for the doctrine of merger, would be reversioner to himself, would be tenant for years with an immediate reversion in himself for years, for life, or in fee,

fee, there is an inconsistency, and incompatibility in his filling both characters. He, in the character of reversioner, would be the person to call upon himself, if his reversion were in fee, or for life, for waste; it would be to himself he would have to perform the services due from him as tenant; and as reversioner, even for years, he would be able to interpose his second term to protect himself from acts of forfeiture committed by him as tenant under the first; and to prevent these and similar objections the doctrine of merger is founded. But where is the inconsistency or the incompatibility of a man having, not two *concurrent*, but two *successive* estates? The objections apply only where they are concurrent; they do not apply where one follows the other. If tenant for years acquire a life interest in the estate *pour auter vie*, the two being concurrent, one only can exist, and the other is merged; but why may not a lease be granted to tenant *pour auter vie*, &c., to commence when his life-estate ceases? He will then be tenant of the freehold, so long as *cestui que vie* lives, but amenable to the reversioner for every duty to which that tenancy is subject; and he will be tenant for the term when *cestui que vie* dies, and still amenable to the reversioner for all the duties of that tenancy. He will never stand in the character, which the law of merger is calculated to prevent, of reversioner to himself. As to the cases cited, *Salmon v. Swann* was a case, as it seems to me, not of a merger of an estate, but of the extinguishment of a right; and though *Colbourne v. Mixstone* appears, according to the report in *Leonard*, to have been the case of an *interesse termini*, it appears by the roll to have been the case of a subsisting and concurrent term. In *Salmon v. Swann*, *Brook*, the owner in fee,

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for twenty-one years; but that it must be taken to have been obtained by him to protect his own lease; that he must be supposed to have acquired it for honest purposes to extinguish it, not for dishonest purposes to have the 100 years term enjoyed. This, therefore, is no authority, as it seems to us, for the merger of an *interesse termini*; nor is *Colbourne v. Mixstone*, when the true state of that case, as it appears upon the roll, is known. The question in the case was, whether a lease of two houses to *Alice Leigh* had been merged by a devise to her for life. According to the report in *Leon.*, she had only a lease *in reversion*, expectant upon the determination of a prior lease, which would have given her an *interesse termini* only, but according to the record, she had a lease *of the reversion*, a concurrent lease, which gave her a present estate. The question was, whether the executor of *Alice Leigh* had improperly omitted in her inventory a lease of two houses, and this depended upon another question, whether a devise by the lessor of these two houses to *Alice Leigh* for life, had extinguished that lease. According to the report in *Leon.*, the houses were previously in lease to *Alice Cheap*, for twenty-one years, if she should so long live, and the lease to *Alice Leigh* was a lease *in reversion* for twenty-one years; no distinction is taken between an *interesse termini*, and a right to possession upon *Alice Cheap's* death, but the only material point discussed was, whether *Alice Leigh* had sufficiently assented to the devise to her for life, so as to have vested in herself the life estate. But upon adverting to the record, it appears that what was called in *Leon.* a lease *in reversion*, was in reality a lease *of the reversion*,

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commencing immediately from the date of such lease. The Court is under great obligation to Mr. *Bolland* for having referred them to the record, because that reference removes every difficulty that case could have produced. The record shews that *H. Leigh* the testator had the *Marygold* and three other houses; that he demised one of the three houses to *Melley* at 3*l.* 6*s.* 8*d.* per annum, another to *Burdon* at 5*l.*, and another to *Chippindall* at 2*l.* That within a year after the lease to *Chippindall*, he demised the reversion of that house, when it should happen, to *Alice Leigh* for twenty-one years from the date of that said demise, at 2*l.* per ann. rent, and afterwards demised the *Marygold* and the other two houses to *Alice Leigh* from thenceforth for twenty-one years, paying yearly 9*l.* 6*s.* 8*d.* rent, and afterwards devised the said messuages and rents to the said *Alice Leigh* for the better education of her children: that he died, and she entered into the *Marygold*, and thereof, and of the reversion of the three houses, was seised for life, and received the rents reserved by the three leases, so that *Alice Leigh's* term in two of the messuages was a running term at the time she took the life estate; and had the terms in these two houses subsisted, she would at the same time have been possessed of the reversion of those two houses for her term of twenty-one years, and also seized of a life estate, of an immediate estate of freehold, at the same time. The case, therefore, as to the two houses, was a case not of an *interesse termini* as supposed, but of a subsisting term. These two cases, therefore, conclude nothing in favour of the plaintiff, and upon the grounds we have previously mentioned, we are of opinion that there was no merger in this case, and that as to so much

much of the property in question as depends upon that point, there should be judgment for the defendant. The question on the case is exclusively upon the merger, and what is to be the consequence of our opinion, the case does not state.

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Postea to the defendant.

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THIS was an action of debt on the 3 G. 4. c. 126. s. 65. for penalties. At the trial before *Burrough J.* at the *Lent assizes* 1825, for the county of *Wills*, the jury found a verdict for the plaintiff for one penalty for 100*l.* subject to the opinion of this court upon the following case :

Upon the trial it appeared in evidence that for a considerable time previous to the month of *July* 1824, and at the time of the commencement of this action, the defendant was one of the trustees or commissioners of

The 3 G. 4. c. 126. s. 65. enacts, "that no trustee of any turnpike road shall have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road

for which he shall act ; nor shall any such trustee let out for hire any waggon, wain, cart, &c., or any horse, &c., for the use of any turnpike road for which he shall act as a trustee, nor by himself or by any other person for or on his account directly or indirectly receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act during the time he shall be acting as a trustee of such road, and that every trustee so offending shall, for every such offence, forfeit 100*l.*" Sect. 143. enacts, "that if the penalty shall exceed the sum of 20*l.*, it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty one days' notice be given to the party offending previous to the commencement of such action, and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed." One *A.* had contracted with the trustees of a turnpike road to make certain improvements on the road, and he agreed to perform the same for a specific sum. One of the trustees afterwards agreed with *A.* to let him his horses and cart at the rate of 5*s.* per day, and he did so let them, and they were used on that part of the road which was agreed to be improved by *A.* : Held, that the trustee was liable to the penalty imposed by sect. 65. of the act.

In the notice of action, it was not stated that the defendant, at the time when he let his cart and horses to hire, was a trustee acting in execution of the act : Held, that the notice was therefore bad.

Held, also, that a party omitting to give the notice required by the act of parliament was barred, not merely of his right to recover the costs of his action, but of his right of action altogether.

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the turnpike road leading from *Wincanton* in the county of *Somerset*, to and through the parish of *Mere*, in the county of *Wilts*, unto *Willoughby Hedge* turnpike gate, in the said county of *Wilts*, and had acted as such, and ordered the surveyor upon different occasions where to put stones upon the road, and that it being determined by the commissioners to improve a certain portion of the said road, to wit, that part of the said road situate between *Mere* and *Willoughby Hedge*, they caused a meeting of commissioners for the purpose of letting the same by tender to be advertized, to be holden at the Town Hall *Wincanton*, on *Saturday* the 17th day of *July* then instant; that such meeting was accordingly holden there, at which the defendant attended with other commissioners, and acted with them, when a contract for making the intended improvement was entered into with one *Hodgkinson*, who agreed to perform the same, according to a plan and specification, for the gross sum of 119*l*. *Hodgkinson* commenced his work about the 20th day of the same month, at first with men only, but afterwards applied to the defendant to let him his horses and carts. The defendant agreed to let them at the rate of 5*s*. a day for a horse and cart, accordingly furnished three horses and three carts for about a week, and afterwards a greater number, and that they were used in hauling earth and stones on the part of the road in question, so agreed to be improved by *Hodgkinson*. *Hodgkinson* told him what it was for, and saw the defendant there whilst the horses and carts were so used. He paid the defendant for the letting of each horse and cart, by an order on Messrs. *Messiter*, the treasurer of the trustees, but without any reference to his, *Hodgkinson's*, contract with the trustees; and the whole was so paid by

by *Hodgkinson*, previously to the payment of his own demand, by the trustees, according to the contract. The defendant's horses and carts were proved to have been used on the said part of the road, on one of the days specified in the notice. *Hodgkinson* went to the defendant and asked him for his horses and carts; the defendant did not go to *Hodgkinson*. *Hodgkinson* hired horses and carts of other persons, and he paid all alike. On the 19th of *October* following, and twenty-one days before the commencement of the present action, the defendant was personally served with the following notice:

"Sir, you being one of the trustees and commissioners of the turnpike road leading from the town of *Wincanton*, in the county of *Somerset*, to and through the parish of *Mere*, in the county of *Wilts*, unto *Wiltoughby Hedge* turnpike gate, in the said county of *Wilts*; and having on divers days, to wit, on, &c., [several days in *August* were then specified,] supplied materials for the use of that part of the said turnpike road which is in the parish of *Mere*, and having also, on the aforesaid days let out for hire your waggon, wain, carts, horses and teams, for the use of that part of the said turnpike road which is in the parish of *Mere* aforesaid, contrary to an act passed in the third year of the reign of his majesty *George* the Fourth whereby you have forfeited the penalty or sum of 100*l.* for each of the aforesaid offences so committed by you, amounting together to the sum of 700*l.*; I do, therefore, according to the act, give you notice, that I shall, at or soon after the expiration of twenty-one days from the time of your being served with this notice, commence and prosecute an action of debt against you in one of his majesty's courts

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courts of record for the recovery of the said sum of 700*l*." The action was commenced within three calendar months after the horses and carts above mentioned had been let, furnished and used as aforesaid.

Jeremy for the plaintiff. The question in this case is, whether the defendant, who was clothed with the character of a trustee at the time when he let to hire his cart and horses to a party who had contracted to repair the road, has incurred the penalty imposed by the 3 G. 4. c. 126. s. 65. That section enacts "that no trustee of any turnpike road shall enjoy any office or place of profit under any act of parliament, in execution of which he shall have been appointed, or shall act as trustee or commissioner, or have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act, &c. &c.; nor shall any such trustee let out for hire any waggon, wain, cart, &c., or any horse, &c. for the use of any turnpike road for which he shall *act* as a trustee or commissioner; nor by himself or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit, out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee or commissioner of such road." It then enacts, "that if any person after having been appointed a trustee or commissioner of any turnpike roads shall, without having first resigned his office, be concerned in any such contract or bargain, or let out for hire any waggon, wain, cart, horse, &c., or receive any money out of the tolls aforesaid, every trustee or commissioner so offending shall for every such offence forfeit

forfeit 100*l*." The object of the act was, to prevent a trustee from deriving any profit directly or indirectly from any work to be done upon the roads. This is a case, therefore, within the mischief intended to be remedied, and it is within the very words of the act. *West v. Andrews* (a) is an authority in point. Section 143 enacts, "that if the penalty shall exceed the sum of 20*l*., it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending, previous to the commencement of such action; and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed." Now the effect of that provision is merely to subject the party, who omits to give the notice required by the act, to the loss of his costs. But if that be otherwise, still the notice given in this case satisfies the terms of the act of parliament. The cases decided on the 24 G. 2. c. 44. do not apply, because that statute required that the notice should clearly and explicitly explain the cause of action. But where statutes require notice of action to be given to magistrates, it has been held to be sufficient to give a notice, containing matter sufficient to apprise the magistrate of the nature of the action about to be brought. *Robson v. Spearman* (b), *Jones v. Bird*. (c) But here, all that the act requires is, that twenty-one days' notice should be given previous to the commencement of the action, and the act of parliament has been complied with in that respect.

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and
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(a) 5 B. & A. 322.

(b) 3 B. & A. 422.

(c) 5 B. & A. 837.

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R. Bayly contra. The notice was intended for the benefit of defendants, and the clause requiring the notice should be construed liberally in their favour, and not strictly against them. The object of the enactment was, that defendants should be apprized of the nature of the offence with which they were to be charged, in order that they might prepare for their defence. Now here the notice does not shew that the defendant had committed any offence against the act of parliament, for it does not state that, at the time when he let out his horses to hire, he was a trustee acting in the execution of the act. A declaration stating only the facts contained in this notice, would have been bad in arrest of judgment. The statute 24 G. 2. c. 44. requires that a notice should state the nature of the writ and process; and in *Lovelace v. Curry* (a) it was held, that a notice which omitted to describe the nature of the writ or process was bad. If the notice be insufficient, the plaintiff is not merely deprived of his costs, but barred of his action; for the proviso applies not merely to the matter immediately preceding it, but to the whole of the former part of the sentence; and to that part which gives the right to sue in the superior courts. But, assuming the notice to be sufficient, the defendant is not liable to the penalty imposed by the act; for this was not a contract made for the use of the road, within the meaning of the act. Here the contract was for a specific sum, and, therefore, whether the horses of the defendant did more or less work would be immaterial to the commissioners. This was a sub-contract with the contractor, made *diverso intuitu*, from the contract made by *Hodgkinson* with the commissioners.

(a) 7 T. R. 621.

BAYLEY J. Upon the question, whether the defendant has committed an offence within the meaning of the 3 G. 4. c. 126. s. 65. I have no doubt whatever. This is a case clearly within the spirit of the act. The great object of the legislature was to prevent any bargaining between the trustees and the contractors, so as to give the former an interest adverse to their duty. Now, it is the duty of a trustee to take care that the work to be done upon the roads should be contracted for on terms the least expensive to the public. But if such trustee has horses and carts to let to hire, and he may lawfully let them to any person who contracts to do the work upon the roads, the consequence will be, that where several persons offer to do the work, it will become the interest of the trustees to give an undue preference to that person who is willing to hire his horses and carts. This is a case, therefore, within the mischief contemplated by the act, and it is a case within the words of the act, for the defendant did let out his cart and horses for the use of the turnpike road, for which he acted as a trustee. Then comes the question, whether the notice given in this case was sufficient to entitle the plaintiff to sue; and that raises two questions, the first is, whether according to the true construction of the 3 G. 4. c. 126. s. 143., a plaintiff who omits to give notice, or who gives an insufficient notice, be barred of his right of action or only deprived of his right to costs. The second question is, whether the notice given in this case was such as the act of parliament required. I am of opinion, that the effect of a plaintiff's omitting to give any notice or to give such a notice as the act requires, is to deprive him not merely of the right to recover costs, but to recover at all. Section 143. enacts,

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that if the sum sought to be recovered exceed 20*l.*, the party is to bring his action in the superior courts; and the plaintiff, if he recovers, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending previous to the commencement of such action, and that the same be commenced within three calendar months after the offence. Now, whether the proviso applies only to the matter immediately preceding it, which relates to costs, or to the whole of the preceding sentence, must be collected from the context and nature of the other parts of the proviso. Now, the first part of the proviso, which enacts that there shall be no more than one recovery for the same offence, could not have been intended to apply to the right to recover costs only. It is impossible that the legislature could have intended to subject a party to several actions for the same offence, provided the party suing him were willing to forego costs. The same observation applies to the last part of the proviso. It never could have been intended that a party should be subjected to an action at any distance of time for a penalty, provided the plaintiff were willing to forego his costs. As two out of three parts of the proviso must have been intended to apply to the whole of the matter in the sentence, and not to that which immediately preceded it; it may be fairly inferred that the other part, which requires that notice should be given, applies to the whole of the sentence, and consequently it is a condition precedent to the right of bringing an action, that the party suing should give the notice required by the act. I am therefore of opinion, that it was the intention of the legislature, that a party suing for a penalty under this statute should

should be deprived of any right of action unless he complied with the terms of the proviso; one of which is, that he gave the notice required by the act of parliament. That being so, then the question arises whether the notice in this case was sufficient. The proviso requires twenty-one days' notice to be given to the party offending previous to the commencement of such action. That implies, that some communication should be made to the defendant of the intention of the plaintiff to sue. It certainly would not be sufficient for a party to state in the notice that the defendant had offended against the statute, and if a notice in that general form would not be good, some degree of particularity is required. Now, I am of opinion that it ought at least to be shewn on the face of the notice that an offence was committed against the act of parliament, and no offence could have been committed, unless the defendant, at the time when he let his cart and horses to the contractor, acted as a trustee. It is not stated in the notice, that the defendant did at that time act as trustee. An essential ingredient in the offence created by the act is therefore omitted, and upon that ground alone I think the notice is bad.

HOLROYD J. I am of the same opinion. At first I thought that the proviso merely related to that part of the section which immediately preceded it, and by which it was enacted, that if the plaintiff recovered, he should have full costs; but upon further consideration, I am fully satisfied that the proviso extends to the whole of the matter in the section; and, consequently, that unless a party complies with all the terms of the proviso, he is barred of any right of action whatever.

Judgment of nonsuit.

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A., on the 18th of March 1824, paid into the Totness country bank a quantity of notes of a bank at Dartmouth, to bear interest from that day. The Totness bankers sent the notes early on the following morning to the Dartmouth bank. Upon the receipt of them there, the latter, according to their usual course of dealing with the Totness bankers, gave them credit in account for the amount of the notes. The course of business between the two banks was, that if the Totness bank received notes of the Dartmouth bank in the course of the day, they sent the notes on the following morning to the Dartmouth bank. If the Dartmouth bank received notes of the Totness bank, they, at the close of the business of the day, sent them to the Totness bank. If the balance of the day was in favor of either bank, the amount was paid by a bill upon their respective agents in London. The Dartmouth bank continued to pay their notes until the evening of the 19th: Held, that, as between *A.* and the Totness bankers, the taking of credit in account for the amount of the Dartmouth notes was equivalent to payment to the Totness bankers, and therefore that *A.* was entitled to recover the amount from them.

ASSUMPSIT. The declaration contained the usual money counts, a count for interest, and a count upon an account stated. The defendants paid 145*l* into Court, and pleaded the general issue. At the trial before Abbott C.J., at the Summer assizes for the county of Devon, in 1824, the jury found a verdict for the plaintiff for 655*l.*, subject to the opinion of this Court upon the following case.

The defendants for many years past have carried on the business of bankers at a bank at Totness, in the county of Devon, called *The Totness Bank*, and at another bank at Newton, in the same county. The Totness bank opens at ten every day, and closes at four. On Thursday, the 18th March 1824, the plaintiff, who was not a customer of the defendants, went to the Totness bank and paid in there a number of country bank notes, amounting to the sum of 800*l.*, which were received by the defendants as a deposit of 800*l.*, to bear interest from that day at the rate of 3 per cent. per annum, to be withdrawn only after twenty days' notice, and the interest to cease from the day of the notice. The notes so received from the plaintiff were all payable to the bearer on demand, and consisted of notes to the amount of

657*l.* of a bank at *Dartmouth* in the said county, called *The Dartmouth General Bank*, which was at that time carried on under the firm of *Hine* and Co., of other notes to the amount of 30*l.* of another bank at *Dartmouth*, called *The Dartmouth Bank*, carried on by other persons under the firm of *Harris* and Co., and of other notes of other country banks in the neighbourhood. Of the 657*l.* of the *Dartmouth General Bank* notes, 600*l.* were immediately tied up in separate bundles, containing each 100*l.*, and with the remaining 57*l.*, and all other notes of the two *Dartmouth* banks received in the course of the day, were put aside into a separate division, marked *Dartmouth*, to be sent as hereinafter mentioned. The *Totness* bank never paid away the notes of the *Dartmouth* banks in the course of their issues to customers. In the course of the day the *Totness* bank received 432*l.* of *Dartmouth* and *Dartmouth General Bank* notes from other persons, and at the close of the business of that day, all the *Dartmouth* notes which had been so received from the plaintiff, together with the last mentioned notes, were put up in a parcel directed to Messrs. *Hine* and Co., *Dartmouth*, and this parcel was afterwards given to the person employed by the post-office in carrying the letters between *Totness* and *Dartmouth*, to be delivered by him to Messrs. *Hine* and Co. on his arrival at *Dartmouth*, and it was accordingly delivered to *Hine* and Co. at the *Dartmouth General Bank*, early in the morning of the 19th of *March*, before the usual hour of opening that bank. The amount of all the notes in the parcel was 1119*l.*, and before the opening of that bank the said sum of 1119*l.* was placed to the credit of the defendants in the books of *Hine* and Co., the defendants being indebted to *Hine* and Co. to

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the amount of 840*l.* as hereinafter mentioned, and the notes of the *Dartmouth General Bank* contained in the parcel, were then put into the usual drawers for the purpose of being re-issued. The bank opened at the usual hour, ten o'clock in the morning, and continued to pay all demands till half-past three o'clock in the afternoon, when it stopped payment; but before that time, all the notes of the *Dartmouth General Bank*, received in the *Totness* parcel, had been paid away to different persons in the usual course of business. In the course of that day the *Dartmouth General Bank* had also received from different customers sundry notes of the *Totness* bank, amounting to 50*l.* or 100*l.*, but these were paid after the stoppage, by the clerk of *Hine* and Co. to the executor of Mr. *Hine*, who was at the time of the stoppage in a dying state, and died only one or two days afterwards. It was the practice of the *Totness* bank at the close of every day's business, to make up parcels of country bank notes for the different banks with which they corresponded. The correspondence between the *Totness* bank and the *Dartmouth General Bank*, was for the most part carried on by the postman. The distance from *Totness* to *Dartmouth* is about ten miles; the postman at that time left *Totness* for *Dartmouth* about five o'clock, and arrived at *Dartmouth* between six and seven in the morning, and left *Dartmouth* on his return at six, and arrived at *Totness* about eight in the evening of the same day. The course of business between the two banks was as follows. If in the course of any one day the defendants received any quantity of notes of the *Dartmouth General Bank*, or of the *Dartmouth* bank, or of another bank at *Brixham* in the same county, at the close of the business of the day, they put all such notes into

into one parcel, and gave it to the postman to be delivered to *Hine* and Co. the following morning. If *Hine* and Co. in the course of any one day received any notes of the *Totness* bank, or of the *Newton* bank, or of another bank at *Totness*, carried on by other persons, called *The Totness General Bank*, at the close of the business of the day they put up all such notes into one parcel, and sent it the same evening to the defendants, by the postman, on his return to *Totness*. If upon the making up of the parcel of the *Dartmouth General Bank* on the evening of any one day, a balance was left in favor of the *Totness* bank, that balance was ordered to be paid in *London* by the *London* agents of the *Dartmouth General Bank* to the *London* agents of the *Totness* bank, by a letter sent by the *Dartmouth General Bank* for that purpose by the *London* post of the same evening; but if on the contrary, upon the making up of such parcel the balance was in favor of the *Dartmouth General Bank*, and the *Totness* bank did not receive a sufficient quantity of notes in the course of the next day to meet that balance, the difference was ordered to be paid in *London* by the *London* agents of the *Totness* bank to the *London* agents of the *Dartmouth General Bank*, by a letter sent by the *Totness* bank for that purpose by the *London* post of that evening. On the morning of the 17th of *March* the accounts between the two banks were exactly balanced, but on the evening of that day the *Dartmouth General Bank* sent by the postman a parcel for the *Totness* bank, containing 25*l.* in *Totness* notes, and a good check upon the defendants, drawn by one of their customers for 315*l.* The parcel arrived as usual after the banking hours, and was not opened till the opening of the bank on the following morning, and the

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Totness bank became their debtors to the amount of 340*l*.

The case was argued by *Carter* for the plaintiff and *Coleridge* for the defendant. The question principally discussed in argument was, whether the defendants had or had not been guilty of laches by leaving the notes with the *Dartmouth* bankers; but it was also insisted on the part of the plaintiffs, that as the defendants had consented to take credit in account with the *Dartmouth* bankers for the amount of the notes on the morning of the 19th (when they might have received the same in money) as between the plaintiff and them, that was equivalent to payment: at the moment when they took that credit, they trusted the *Dartmouth* bankers at their own peril. As between the plaintiff and the defendants, it was the same thing in point of legal effect, as if at the time when the credit was given in account, the *Dartmouth* bankers had paid the amount of the notes in money, and that money had then been returned to the *Dartmouth* bankers by the defendants to hold it for their use. As the judgment of the Court proceeded entirely upon the latter ground, it is unnecessary to state the arguments upon the other point.

BAYLEY J. There can be no doubt that the plaintiff is entitled to recover to the extent of 340*l*., the amount of the debt due from the *Totness* bank to the *Dartmouth* bankers. It appears by the case stated for the opinion of the Court, that it was the practice for the *Totness* bank to receive the notes of other country banks. They must, therefore, adopt some mode of getting payment, and for that purpose, in the ordinary course, would employ agents to present them for payment, and would be bound by the acts of such agents.

It is the duty of an agent so employed to present bills or notes for payment, to take care that something equivalent to payment should take place. In this case the defendants authorized their agent to give possession of the notes to the *Dartmouth* bankers. The latter, therefore, who were the makers of the notes, became the agents of the *Totness* bank, but instead of immediately paying the notes to the latter, or to any person on their behalf, entered them according to their usual course of dealing, in account to the credit of the *Totness* bank. The *Dartmouth* bankers were also the agents of the *Totness* bank as to other notes, and they received the amount of those notes in cash. But they, by the authority of the defendants, entered the amount of their own as an item of credit in an account between them and the defendants. I am of opinion that, as between the *Totness* bank and the plaintiff, the taking of that credit must be considered as payment. If the notes had been presented by any other person employed by the defendants as agent, he might have had money for them. The *Totness* bankers, by making the *Dartmouth* bankers their agents, and authorizing them to give credit in account for the notes instead of paying the amount of them immediately, must be taken to have consented that that credit given to them by the *Dartmouth* bankers should be equivalent to that payment which would have taken place if any third person employed by them had presented the notes for payment. The defendants, from the time when the credit was given them, trusted the *Dartmouth* bankers. The course of dealing shews that the *Totness* bankers authorized the *Dartmouth* bankers to deal with the notes as if they had been paid by them. For if they had not been paid, they ought to have been returned to the *Totness* bankers,

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but they were in fact re-issued by the *Dartmouth* bankers. Upon the principle that, by the course of dealing, the *Dartmouth* bankers were made the agents of the *Totness* bankers, and that the latter gave authority to the former to give credit in account for their own notes instead of paying them immediately in money, I think that the *Totness* bankers must, as far as the plaintiff is concerned, be considered to have received payment of these notes from the *Dartmouth* bankers, and consequently that the plaintiff is entitled to recover 657*l.*, the full amount of the *Dartmouth* notes paid by him into the hands of the *Totness* bankers.

HOLROYD J. The notes were received by the defendants as cash payable with interest from the moment when the notes were received, and not merely from the time when the defendants would in due course receive payment of them from the *Dartmouth* bank. The notes were, therefore, treated as cash. I do not mean to say that if they turned out to be of no value at the time when they were deposited, that they must be considered as cash. That would be a very different case. The defendants, instead of sending a clerk to receive cash for the notes, sent them to the persons who ought to have paid them, but they sent them, not for the purpose of being paid in money, but of being placed to their credit in account. When that credit was given, the legal effect was the same as if the notes had been paid to them in money, and the *Dartmouth* bankers had agreed to hold that money to the use of the *Totness* bank; or the same thing as if the notes had been actually paid to the defendants, and they the defendants had lent the amount to the *Dartmouth* bank. By allow-
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ing the amount of the notes to be placed to their credit in account, the defendants authorized the *Dartmouth* bank to treat these notes as their own. And if the latter had a right to re-issue them by the authority of the defendants, that could only be on the understanding that they had become the property of the *Dartmouth* bank. I think these notes must be considered as cash notes deposited with the defendants, and that the amount having been paid to them by the *Dartmouth* bankers, remained in their hands to the use of the plaintiff.

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LITTLEDALE J. concurred.

Judgment for the plaintiff.

CURTIS and Another, Assignees of GEORGE LAING, a Bankrupt, against DAVID BARCLAY.

ASSUMPSIT for money had and received. At the trial before *Abbott C. J.*, at the *London* sittings before *Michaelmas* term 1823, a verdict was found for the plaintiffs for 667*l.* 11*s.* 6*d.*, subject to the opinion of this Court upon the following case :

The plaintiffs were assignees of the estate and effects

It was agreed between *A.*, resident in *London*, and *B.*, who resided in the *West Indies*, that the former should accept bills drawn upon him by *B.* to a speci-

fied amount, upon *A.*'s having bills of lading filled up to his order for coffee, sugar, cotton, and rum, and that after deducting his (*A.*'s) advances, charges, and commission, the balance was to be paid to *C.*, who was a merchant resident in *London*, and for whom *B.* acted as agent in the *West Indies*. *B.* shipped goods with a bill of lading filled up to *A.*'s order. At the time when the goods arrived *C.* had become bankrupt. *A.* demanded the goods, but the captain having wrongfully refused to deliver them, he brought trover against the captain. Before any assignees were chosen under *C.*'s commission the cause was referred to arbitrators, but they not having made any award, the cause was tried, and *A.* recovered the proceeds of the goods. The assignees of *C.* having brought assumpsit for money had and received to recover the proceeds of the goods: it was held, that *A.* was authorised by the bill of lading to act for the benefit of all concerned, and to do all that was necessary to obtain possession of the goods, and there being nothing to shew that a reference was an improper step, it was held that *A.* was entitled to deduct the costs of the reference as well as of the cause.

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of *George Laing*, a bankrupt, under a commission of bankrupt issued against him, dated the 29th *January* 1819. The act of bankruptcy was committed in the early part of *January* 1819. The commission, although issued in *January*, was not opened till the 31st of *August* 1819. The bankrupt carried on business in *London* as a merchant, and exported a considerable quantity of goods to the *West Indies*, in the month of *September* 1818. *James Laing* was the agent of the bankrupt, and had the superintendence and management of the merchandize so exported. In the month of *September* 1818 the bankrupt and the house of the defendant, which then consisted of himself and his brother (since deceased) carrying on business under the firm of *Barclay* brothers, came to the arrangement contained in the letters set forth in the case. It appeared from the correspondence, that in *November* 1818 it was agreed, between *James Laing* and the defendants' house, that the defendants' house should accept bills to be drawn upon them by *James Laing*, to the extent of 30,000*l.* upon having bills of lading filled up to their order, for coffee, sugar, cotton, and rum, and that after deducting their advances, charges, and commissions, the balance was to be paid to *George Laing*. On the 18th *March* 1819 the defendant received a letter from *James Laing*, advising him that he had shipped 41 puncheons of rum, and 14 half tierces of coffee on board the *Susan*; the following bill of lading was inclosed in the letter. "Shipped, by the grace of God, by *James Laing*, as agent, in and upon the good brig called the *Susan* (master, *D. Gibson*) 41 puncheons of rum and 14 half tierces of coffee, to be belivered at the aforesaid port of *London* (the act of God, &c. excepted)

cepted) unto Messrs. *Barclay* Brothers or their assigns, he or they paying freight for the said goods 5s. sterling per cwt. for coffee, and $4\frac{1}{2}$ per gallon for rum, with primage and average accustomed." The *Susan* had been chartered by the bankrupt. The ship arrived in *London* with the goods mentioned in the bill of lading in *April* 1819. The defendant demanded them of the captain, as consignee under the bill of lading; the captain claimed to have a lien on the goods for the freight due to him under the charter-party. The defendant refused to pay more than the freight due under the bill of lading; and upon the captain's refusal to deliver the goods, upon receipt of such freight, the defendant and his late partner, on the 17th day of *April* 1819, brought an action of trover in their own name against the captain for the non-delivery, pursuant to the bill of lading. The cause was referred to the arbitration of two barristers, but no award being made, the cause was tried, and a verdict obtained in favor of the present defendant and his said late partner, who in pursuance thereof received the proceeds of the goods from a broker, who had been employed, by consent of the defendant and the captain, to receive the proceeds of the sale of the goods, and retain the same as a stakeholder. The proceeds, amounting to 737*l.* 2*s.* 8*d.*, were paid to the attornies of the now defendant, on the 28th of *November* 1820, and by them paid over or accounted for to the defendant. The costs of insurance and other charges which the defendant was entitled to retain and be reimbursed out of the said proceeds, amounted to 67*l.* 11*s.* 2*d.* The costs incurred by the defendant in the cause and arbitration, amounted to 167*l.* 11*s.* 6*d.* The now defendant has
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not been able to obtain payment of these costs from the captain, who is insolvent, and resides in *Scotland*.

In *May* 1819, the defendant received a letter from *James Laing*, advising him that he had drawn a bill upon him for 500*l*. That bill was afterwards presented to the defendant, who refused to accept the same. In *July* 1819 the defendant received directions from *James Laing*, to pay over to *George Laing* the balance of the proceeds of the goods shipped by the *Susan*. After the defendant refused to accept the bill, *James Laing* procured it to be paid by the defendant out of funds belonging to himself, and commenced an action against the defendant, to recover the damages which he alleged he had sustained by the defendant's refusal to accept the bill, and he obtained a verdict for 525*l*. viz. 500*l*. the amount of the bill, and 25*l*. damages, and ultimately recovered judgment thereupon for that sum, and costs, which the defendant in *Hilary* term 1823 paid. The defendant paid 4*l*. 6*s*. into court, and if he is entitled to set off against, or to deduct from the demand in this cause, the sum of 167*l*. 11*s*. 6*d*., the amount of the said costs, and also the said sum of 500*l*., the amount of the bill of exchange; the plaintiffs' demand will be satisfied by such payment into court and set-off.

This case was argued in the course of these sittings by *F. Pollock* for the plaintiffs and *Campbell* for the defendant.

For the former it was contended, that the plaintiffs were entitled to recover the entire proceeds of the cargo sold by the joint act of the captain and the defendant, as they would have been if they had brought trover.

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In that case the sale must have been considered a wrongful conversion, and the plaintiffs would be entitled to recover the whole value of the goods. But the plaintiffs had brought assumpsit, and it appeared that the defendant, before the bankruptcy of *G. Laing*, had entered into an obligation to accept bills on account of the goods shipped, and in consequence of that obligation he became ultimately compelled to pay the sum of 500*l*. If the defendant had no more than a lien on the goods, that lien never attached; for the goods never came into his possession. It was finally admitted, however, that the legal title to the goods was in the defendant; that the possession of the captain was his possession; and, therefore, that the defendant was entitled to set off the sum of 500*l*., as well as the costs necessarily incurred in recovering the goods; but it was contended, that they were not entitled to be allowed the costs of the reference. The act of bankruptcy had been committed, and the commission had issued at the time when the reference was agreed to by the captain and the defendant; and they had no power to bind the bankrupt or his assignees by the submission. The defendant had no right of property in the goods, except as a mere security against the bills he might accept against them. For the defendant it was urged, that the plaintiffs, in this action, could recover only so much money as the defendant had received to their use. The plaintiffs never had any title but to the net proceeds of the goods. By the terms of the contract, *G. Laing* was only to have the balance, after deducting the charges. Now any costs *bonâ fide* incurred by the defendant, in order to obtain possession of the goods, are part of the charge upon the goods. If the defendant, therefore, incurred

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the costs of the reference, bonâ fide, with a view of speedily obtaining possession of the goods, they become a charge upon the goods: and there is nothing to shew that the submission was not bonâ fide entered into with a view to obtain speedy possession of the goods.

Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court.

This was an action by the assignees of *G. Laing*, a bankrupt, against the defendant, as surviving partner of his brother, for money had and received to the use of the plaintiffs, as such assignees; and the question was, whether the defendant was entitled to deduct from the plaintiffs' demand a sum of 167*l.* 11*s.* 6*d.*, for certain costs, which the defendant's house had incurred, and a sum of 500*l.* for a bill of exchange the defendant's house had paid. The plaintiffs had a verdict for 667*l.* 11*s.* 6*d.*, so that the sums I have mentioned exactly balanced that account. The 667*l.* 11*s.* 6*d.* for which the verdict was taken, was the balance of a sum of 737*l.* 2*s.* 8*d.*, received by the attornies for the defendant's house, after the bankruptcy of *G. Laing*, as the produce of certain goods shipped by *James Laing* from *Demerara*, in *January* 1819. The facts relating to those goods raise the question in this cause. In *September* 1818 it was bargained between *James Laing* and the defendant's house, that the defendant's house should accept bills, to be drawn upon them by *James Laing*, to the extent of 30,000*l.* upon the defendant's house having bills of lading filled up to their order for coffee, sugar, cotton, and rum, and that after deducting their advances, charges and commission, the balance was to be paid to *George Laing*. Upon the footing of this bargain rum and coffee were shipped by the *Susan*, a bill of lading making

making them deliverable to defendant's house, or their assigns, they paying freight for the same, was transmitted to the defendant's house, and a bill for 500*l.* was drawn by *James Laing* upon the defendant's house, which bill they were compelled to pay. The amount of that bill (500*l.*) constituted one of the items which the defendant claimed a right to deduct; and after putting the question as to that sum in the only way in which it could be put on the part of the plaintiffs, the claim as to that sum was candidly abandoned, and the question was confined to the other sum, the 167*l.* 11*s.* 6*d.* The following were the facts as to that sum. When the goods by the *Susan* arrived, which was in *April* 1819, the captain wrongfully refused to deliver them upon the terms of the bill of lading, viz. upon the payment of the freight for the same, and insisted upon all the freight payable under a charter-party before he would deliver them; and in compelling him to deliver them upon the terms of the bill of lading, the defendant's house incurred an expence to the amount of 167*l.* 11*s.* 6*d.* That sum was composed partly of the costs of an action, and partly of the costs of a reference; and it was urged upon the argument that there was a distinction between these two species of costs; and that if the defendant should be entitled to deduct the former, the costs of the action, he could not be entitled to deduct the costs of the latter, the costs of the reference. The validity of this distinction, however, will depend, as it seems to us, upon the powers which, under the circumstances, the bill of lading gave the defendant's house; for if the effect of the bill of lading were to authorize the defendant's house to act for the benefit of all concerned, and to vindicate their own rights and the rights of those to whom the property would belong, when their rights should be

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satisfied, they would be entitled to reimburse themselves out of the proceeds, whatever they should reasonably and properly expend in that respect: and is not this the effect of the bill of lading? It entitles them solely and exclusively, in the first instance, to the possession of the goods, but is that possession to be for their own benefit only — to give them the whole and entire property? Certainly not: they are to pay themselves; but as soon as their demand is satisfied, their rights cease, and whatever remains is to be *George Laing's*. When a wrong-doer, therefore, withholds possession, they have a *right* for themselves, and a *duty* towards *George Laing*, to take proper steps to obtain the possession; and the expence properly incurred, of obtaining that possession, is a charge upon the goods. They are to be repaid out of the goods the advances they have made; but the goods repay them nothing till they can get possession, and when they have got possession, if expence has been incurred in obtaining that possession, the repayment of the advances cannot be said to have begun till the discharge of the expence is ended. If a debtor assign a demand he has for 500*l.* to a creditor, and the creditor necessarily incurs an expence of 100*l.* to get it, how much is his debt diminished? not 500*l.*, the sum paid, but 400*l.*, the sum he can put into his pocket. So here, what is the sum put into the funds of the defendant's house, not 667*l.* 11*s.* 6*d.*, the sum which the goods produced, but 500*l.* only, the surplus, after deducting the expences, and that 500*l.* defendant is entitled to keep, to reimburse himself the amount of *James Laing's* bill. For what purpose was it that the bill of lading was sent to the defendant's house? that they might reimburse themselves: they ought, therefore, to have the power fully

fully to reimburse themselves. In what situation were they placed when the goods arrived? The captain, *George Laing's* agent, in this respect, wrongfully refused to deliver. *George Laing* was a bankrupt, so that he could give no directions. No assignees were chosen, so that no directions were given by them. The defendant's house, therefore, were fully warranted in doing what seemed best. Had any part of the expence of 167*l.* 11*s.* 6*d.* been improperly incurred, had the reference been an improper step, had there been any misconduct in the house, in neglecting to advise with *George Laing*, or whoever at the time might be acting for him, questions upon those points would have been proper for the consideration of the jury; but stated as this case is, without any imputation as to the incurring of this expence, we are of opinion, that the defendant is entitled to deduct this sum as well as the 500*l.*, and that a nonsuit ought to be entered.

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Judgment of nonsuit.

GRANGER *against* GEORGE.Wednesday,
January 25th.

CASE for not taking care of and re-delivering to plaintiff three boxes containing deeds, papers, &c. of plaintiff, which had been delivered to defendant to be safely kept and re-delivered to plaintiff on request. Count in trover for the boxes, &c. Pleas, first, not guilty; second, that the causes of action in the declar-

The statute of limitations is a bar to an action of trover, commenced more than six years after the conversion, although the plaintiff did not know of the conversion until

within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period.

The declaration was filed generally, as of *Michaelmas* term: Held, that the defendant might give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill."

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ation mentioned did not accrue within six years next before the exhibiting of the bill of plaintiff in this behalf. Replication, that the causes of action did accrue within six years, &c. At the trial before *Abbott C.J.* at the *Westminster* sittings after last *Michaelmas* term, it appeared that the boxes were placed in the defendant's custody about the year 1816. Plaintiff had before that time become bankrupt, and a commission issued against him, and on the 10th of *November* 1818 defendant delivered up the boxes with their contents to certain persons describing themselves as assignees under that commission. The writ in the present action was sued out on the 26th of *November* 1824, returnable on the 29th, but the declaration was filed generally as of *Michaelmas* term in that year. The boxes were demanded by the plaintiff in *September* 1824, and there was no evidence that he knew of the conversion in 1818, until the defendant, at the time of the demand, said that he had delivered them up in 1818. Under these circumstances it was contended for the plaintiff, that although the plea of the statute of limitations might be an answer to the first count, yet it could not to the count in trover. That as the plaintiff never knew that the goods were parted with in 1818, until he demanded them in 1824, he was not bound to treat the act in 1818 as a conversion, but might rely upon the demand and refusal in *September* 1824. It was also contended, that the declaration must be taken to have been filed on the first day of *Michaelmas* term, and that the defendant could not in answer shew the time when the writ was issued, his plea being that the cause of action did not accrue within six years before the "exhibiting of the bill," not "before the commencement of the suit." The Lord Chief Justice

tice thought that the statute of limitations was an answer to the plaintiff's case, and directed a nonsuit.

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Scarlett now moved to set it aside, contending as before, that the plaintiff could not be bound by the defendant's tortious act in 1818, of which he had no notice. It is true that in assumpsit the courts have held the statute to be a bar where the breach of contract has been committed more than six years before the commencement of the action, although the plaintiff did not discover it until within that period; but there is no such decision as to an action of trover. Again, the declaration being entitled generally, had reference to the first day of *Michaelmas* term, and then the bill must be taken to have been exhibited within six years after the conversion. If the defendant wished to shew the real time when it was filed, he should have applied to the Court to compel the plaintiff to entitle his declaration specially, according to the rule given in *Tidd's Prac.* 480. (a)

ABBOTT C. J. The evidence given on the part of the plaintiff did not make out, with any distinctness, either the time or terms of the actual deposit with the defendant. But it appeared, that when in *September* 1824 the boxes were demanded, the latter replied, that in 1818 he had delivered them over to certain persons whom he named; and it was proved that he had so parted with them on the 10th of *November* in that year. It also appeared, that the plaintiff's declaration was filed generally as of *Michaelmas* term, the writ, however,

(a) Sixth edition.

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was returnable on the 29th of *November*. Under such circumstances, I thought I was bound to consider the bill as exhibited on that day, which left the effect of the statute of limitations open to the defendant. Upon that point I thought, and I still retain the same opinion, that the statute began to run from the time of the act done by the defendant, although the plaintiff had not any notice of it; there not being evidence of any fraud practised by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done. The plaintiff was certainly guilty of laches in not making inquiries respecting the property at an earlier period, and has no ground of complaint that he is not now entitled to recover.

BAYLEY J. The gist of this action is the conversion. Now when the defendant proved that the goods had been out of his possession for more than six years before the commencement of the action, it was manifest that he could not have converted them within that period. The cases of *Short v. M'Carthy* (a), and *Brown v. Howard* (b), shew that the want of knowledge in the plaintiff makes no difference. Upon the other point, it is true that the declaration relates *prima facie* to the first day of term, but that is matter of evidence, and when the writ was produced, returnable on the 29th of *November*, the presumption was that the party declared on that day. The nonsuit was therefore right.

Rule refused.

(a) 3 B. & A. 626.

(b) 2 B. & B. 73.

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WATSON *against* WACE and Others.Wednesday,
January 25th.

TRESPASS for breaking and entering plaintiff's dwelling house, and seizing and carrying away his goods. Plea, not guilty. At the trial before *Abbott C. J.* at the *Westminster* sittings, after last *Michaelmas* term, it appeared that the action was commenced in order to try the validity of a commission of bankruptcy issued against the plaintiff. The defendants admitted the trespass, and in answer proved that the plaintiff, being in custody at the suit of *Wace* when the commission issued, afterwards applied to the Court of King's Bench to be discharged, and was accordingly discharged on the ground of his having become bankrupt, and that *Wace* had proved his debt under the commission. The Lord Chief Justice, on the authority of *Goldie v. Gunston* (a), held, that the plaintiff ought not to be permitted to dispute the bankruptcy in this action, after having taken the benefit of it in obtaining his discharge, and directed a nonsuit.

Where a commission of bankruptcy issued against a person then in custody at the suit of the petitioning creditor, and who afterwards applied to the Court of K. B., and obtained his discharge under the 49 G. 3. c. 121. s. 14., on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission: Held, that he could not, in an action against the assignees, dispute the validity of the commission.

Campbell now moved for a new trial. The evidence given on the part of the defendants certainly cast a great onus on the plaintiff, but it ought not to have been treated as a conclusive answer to the action. The proceeding on the part of the bankrupt was taken under the 49 G. 3. c. 121. s. 14. But by the operation of that section, the action by *Wace* was discontinued by the act

(a) 4 *Camp.* 381.

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of proving his debt, *Ex parte Woolley* (a). The right to detain the debtor was then at an end, and the debtor was on that ground entitled to be discharged. In the 6 G. 4. c. 16. s. 59., the greater part of which is copied from the 49 G. 3. c. 121. s. 14., a provision is inserted whereby a bankrupt is spared the trouble of applying to be discharged, for no creditor who has brought an action against and arrested the bankrupt is allowed to prove under the commission, without signing a sufficient authority for his discharge out of custody. A discharge under the 5 G. 2. c. 30. s. 13. is very different; that may be an estoppel, for there the bankrupt relies upon the certificate, which is a bar to any action by the creditor; it is, therefore, reciprocally binding on both creditor and debtor. But a creditor may contest the commission, although he has proved under it, *Stewart v. Richman* (b), *Rankin v. Horner* (c). The plaintiff, therefore, ought not to be estopped from disputing the validity of the commission, for all estoppels must be mutual, *Co. Lit.* 352 a. So also they should be certain to every intent, and are not to be taken by way of argument or inference. The supposed estoppel, in this case, can only be taken by inference. Again, an estoppel must be pleaded, otherwise the jury may find the truth of the fact, and the Court will give judgment accordingly, without regard to the estoppel, *Com. Dig., Estoppel, (C.)* (E. 10.) *Pleader, (S. 5.)* Here the estoppel not being pleaded, the jury should have been allowed to find the truth of the fact.

ABBOTT C. J. I am of opinion that the nonsuit in this case was right. I do not consider this as a case of

(a) 1 Rose, 394.

(b) 1 Esp. 108.

(c) 16 Eqst, 191.

estoppel

estoppel strictly and technically so called. But the plaintiff having brought an action against the defendants for seizing his goods, they plead the general issue, thereby denying that the goods of the plaintiff were taken. It appeared in evidence that a commission of bankrupt had issued against the plaintiff, on the petition of *Wace*, at whose suit the plaintiff was then in custody. *Wace* having proved under the commission, the plaintiff applied to this Court to be discharged out of custody, on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission, and he was accordingly discharged. The estoppel, in this case, therefore, arises by matter of evidence, and the question is, whether a party, having availed himself of the commission for one purpose, can afterwards be allowed to assert to the same Judges before whom he took the benefit of the commission, that the commission was invalid. Lord *Ellenborough* gave his opinion to the contrary, and that has never since been questioned. I think his judgment was founded on good sense and good law, and that we ought not to allow the plaintiff to say in this court that he was not a bankrupt. This decision will not be conclusive upon him; he may petition the Great Seal, and there an enquiry may be directed to be made by the trial of an issue, and the defendants may be prevented from relying upon the estoppel.

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The other Judges concurring,

Rule refused.

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GALE *against* LAURIE and Others.

The 53 G. 3. c. 159. s. 1. is to be construed as if the words, "with all her appurtenances," had been inserted after "ship or vessel," as in sect. 7.

Whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owner, constitutes a part of the ship and her appurtenances within the meaning of the 53 G. 3. c. 159., and the owner is liable to the extent of the value thereof for damage done to another vessel in the manner described by that act.

THE plaintiff declared in prohibition, that by an act of the 53 G. 3. c. 159. entitled "An act to limit the responsibility of ship owners in certain cases," it was amongst other things enacted, that no person or persons who was, were, or should be owner or owners, or part owner or owners of any ship or vessel, should be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter or thing done, omitted, or occasioned without the fault or privity of such owner or owners, which might happen to any other ship or vessel, or to any goods, wares, merchandize, or other things being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which might be in prosecution or contracted for at the time of the happening of such loss or damage. The declaration then stated, that on the 9th of *March* 1820, the plaintiff was owner of a ship or vessel called the *Dundee*, then sailing on the high seas, bound on a certain voyage to the *Greenland* fisheries, with certain fishing stores on board thereof, consisting of harpoons, lances, spears, and whale lines, for the purpose of catching whales and other fish on the said voyage, and casks and cisterns for containing the oil and blubber proceeding from the said whales and other fish; and that the *Dundee* did then, without the fault or privity of such owner, come in collision with and sink a certain other ship or vessel called the *Prin-*

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cess *Charlotte*, then also sailing on the high seas, bound on a certain voyage to the port of *London*, of which ship the defendants were the owners: that the defendants entered an action in the High Court of Admiralty, and that thereupon the *Dundee*, her tackle, apparel, and furniture were valued and appraised at the sum of 2685*l.*, and the fishing stores at the sum of 2236*l.*, and that bail was given in the sum of 9000*l.* without prejudice to and expressly reserving the question as to the liability of the plaintiff in such action beyond the sum of 2685*l.*, being the agreed value of the *Dundee*, her tackle, apparel, and furniture. But that although the court of admiralty had no power or authority whatever under the statute aforesaid, or any other statute or law of this realm or otherwise, to make the fishing stores of any ship or vessel liable to answer for or make good any loss or damage arising or taking place by reason of any such neglect, matter, or thing done, omitted, or occasioned without the fault or privity of the owner or owners of such ship or vessel, which might happen to any other ship or vessel, or to any goods or merchandize or other things being in or on board of any other ship or vessel, yet the court of admiralty decreed the said fishing stores on board the *Dundee* as aforesaid to be liable to contribution against the form and effect of the said statute; and that the defendants had not ceased to prosecute their suit in the said court of admiralty, to the great damage of the plaintiff, and against the king's writ of prohibition to them delivered, and, therefore, the plaintiff as well, &c. brought his suit, &c. Plea, suggesting as ground for a consultation, that the said fishing stores so being on board the said ship or vessel in the declaration mentioned, called the *Dundee*, at the time of the happening of

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of the loss or damage in the declaration mentioned, were, and are part and parcel of the said last mentioned ship or vessel, appurtenances, and freight, according to the true intent and meaning of the said act of parliament in the declaration mentioned and set forth, and that the value of the said fishing stores did form part of the value of the said ship or vessel, appurtenances; and freight, within the true intent and meaning of that act. Issue thereon. At the trial before *Abbott C. J.*, at the *London* sittings, the jury found a special verdict, the material parts of which were as follows:

At the time of the passing of the said act of parliament, the fishing stores belonging to ships employed in the *Greenland* fisheries, consisted, and still do consist of, harpoons, lances, spears, lines, boats, and various other things for the purpose of catching whales and other fish, and preparing their blubber, and of casks for containing and bringing home to *England* the blubber and oil proceeding from the said whales and other fish caught upon the voyage; and the value of such casks was, and is generally, one half of the whole value of such fishing stores. In the outward voyage of the said ships the said casks were, and are carried out on board the ships ready for receiving the blubber and oil, and are used for several voyages; but in ships employed in the *South Sea* fisheries, (which are provided with similar fishing stores,) the staves and hoops of the casks for the purpose of containing the oil obtained or the principal part thereof, were and are carried out in packs, and were and are made up into casks in the *South Seas*; and the oil so obtained by such last mentioned ships, when brought home to this country, was and is sold in the said casks, the purchasers thereof purchasing and paying for

for such last mentioned casks with such last mentioned oil. According to the usage of trade, where policies of insurance have been effected on ships, their tackle, apparel, munition and furniture, which ships are employed in the *Greenland* fisheries, and losses have happened to such ships and their fishing stores, such stores have not been, and are not covered by such policies, nor has a loss upon the fishing stores been paid for by the underwriters upon the ships having the same on board, and when a particular average loss has happened upon any such policy, the fishing stores on board such ships have not contributed to such particular average, but it is the practice that such fishing stores are insured in separate policies or by separate valuations, and the said usage and custom of merchants existed long before and at the time of the passing of the act of parliament. It is usual for ships employed in the *Greenland* fisheries, during the fishing seasons, to make intermediate voyages to the *West Indies* and *Honduras*, or the *Baltic* sea, or to be used in the coasting trade of this kingdom, and when such ships go such intermediate voyages, or are so employed in the coasting trade, the said fishing stores are all landed and left behind; and such ships, whilst employed in the *Greenland* fisheries, are in all respects fitted and equipped with tackle, apparel, boats, and stores for the ordinary purposes of navigation, and have every thing belonging to ordinary ships, and are in all respects capable of navigating the seas and performing voyages independently of and without the fishing stores. According to the usage of the herring fishery upon the east coast of this kingdom, and so northward, the owners or the masters of the ships employed in the said herring fishery have provided one share of the nets and other

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other fishing stores put on board such last mentioned ships, and the crews of the said last mentioned ships have provided the remaining shares of the said nets and other fishing stores; but when such ships have been hired by merchants for the fishing season, (as has frequently been the case,) one share of the nets and fishing stores have been provided by the owners, another by the crew, and the remainder by the merchants, and the usage of the said herring fishery was the same before and at the time of passing the said act of parliament.

The case was argued at the sittings in banc before Easter term 6 G. 4. by

Campbell, for the plaintiff. Upon the facts found by the special verdict, the fishing stores cannot be considered as appurtenances to the ship, but to the cargo; they are not wanted for the purposes of navigation, but are necessary to the procuring and bringing home a cargo. Suppose the act had said that a party should be liable to the extent of the cargo and its appurtenances, it could not be contended that these stores were not to be taken into consideration, and if they are appurtenant to the cargo, they cannot also be appurtenant to the ship. It is found by the special verdict, that such stores would not be covered by a policy upon the ship, her tackle, apparel, and furniture; and those are, properly speaking, the appurtenances of a ship. Suppose the ship were chartered, and the stores did not belong to the owner of the ship, or that the stores were the joint property of the owner of the ship and other persons, as in the herring fishery, it could not then be said that the stores passed with the ship; yet if appurtenances in one case they must be so in all. The act should, therefore, be

be construed according to the ordinary meaning of the words used, rather liberally than strictly, so as to promote the shipping interest, which appears to have been considered as the object of the legislature in passing the statute upon which this question has arisen, *Wilson v. Dickson* (a), *Canan v. Meaburn* (b), and *Hoskins v. Pichergill* (c)

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Tindal contra. The statute 53 G. 3. c. 159. being made to alter the common law, and abridge the remedy which a party grieved before had, must be construed strictly. The second section shews that all the property of the owner of the ship, on board the ship at the time of doing the injury, was intended to be liable; and it provides for a difficulty which might arise as to the calculation of freight. In this case the object of the voyage could not be carried into effect without the stores, they could not be used for any other purpose but fishing, and were the property of the owner of the ship. Suppose a ship to be fitted out as a privateer, the guns are not necessary to sailing, but to the purposes of the voyage. In like manner the fittings of a packet ship, although often very expensive, are not necessary to what seems on the other side to be considered the abstract idea of a ship, viz. something that will carry another thing from some one place to some other place. Yet the guns in the former case, and the fittings in the latter, would be appurtenances of the ship. The finding of the jury that a policy upon a ship, her tackle, apparel, and furniture would not cover these stores, cannot affect the present

(a) 2 B. & A. 2.

(b) 1 Bing. 425.

(c) *Mansf. Ins.* 765.

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question; for the word *appurtenances* is larger than furniture; besides a policy is an instrument construed by the usage amongst merchants, and that cannot affect the construction of an act of parliament.

Cur. adv. vult.

The judgment of the Court was now delivered by

ABBOTT C. J. This case came before the Court upon a special verdict found in a suit brought by the owner of a ship called the *Dundee*, against the owners of a vessel called the *Princess Charlotte*. The suit in this Court is for a prohibition to the instance court of admiralty, to prevent the execution of a sentence therein given against the owner of the *Dundee*, in favor of the owners of the *Princess Charlotte*, in a suit instituted in that court for the recovery of damages for the loss of the *Princess Charlotte*, which was sunk by collision with the *Dundee*. And the question arises upon the statute 53 G. 3. c. 159., "An act to limit the responsibility of ship-owners in certain cases." At the time of the collision, which happened without any fault or privity of the plaintiff, the *Dundee* was sailing outward on a voyage to the *Greenland* fishery, having on board the necessary stores and implements for the taking of whales and other fish, and procuring and bringing home the oil and blubber obtained from them. In the Court of Admiralty a valuation was made of these stores and implements, distinct from the value of the ship. There was no question as to the collision, or the responsibility of the plaintiff independent of the statute. The sentence of the Court of Admiralty was against the plaintiff, both as to the value of the ship and the value of these stores and imple-

implements. It was contended, that the plaintiff was not answerable in respect of the value of the latter, and on that ground a prohibition was applied for; the plaintiff declared in prohibition, the cause went down to trial, and a special verdict was found. (The Lord Chief Justice then read the parts of the special verdict before set out, and proceeded as follows.)

The case was argued before us, in the month of *April* last; and we are of opinion that the present plaintiff, the owner of the *Dundee*, is responsible to the value of the fishing stores.

By the first section of the act it is enacted, "that no owner or owners of any ship shall be liable to answer for any loss or damage arising by reason of any act, &c. done without the fault or privity of such owner or owners, to any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due during the voyage, which may be in prosecution, or contracted for at the time of the happening of such damage." In this section the word "ship" only is used, but in the following sections the phrase "value of the ship and her appurtenances" occurs not less than ten times. The same phrase occurs in the first section of the 7 G. 2. c. 15., and of the 26 G. 3. c. 86. The three acts are all in *pari materia*, and there can be no doubt, that the first section of the act on which this question arises, is to be understood as if the words "with all her appurtenances," were used therein, supposing those words would make any difference in the sense.

These acts were certainly made to encourage persons to become owners of ships, and in conformity with similar provisions

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provisions contained in the law of many of the maritime states of the continent of *Europe*. Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law; and there is nothing to require a construction more favorable to the ship-owner, than the plain meaning of the words imports. The ship in question was in the prosecution of a voyage in which no freight could be earned. The fishing stores were not carried on board the ship as merchandize, but for the accomplishment of the objects of the voyage; and we think, that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers, or goods, or the fishery.

This construction furnishes a plain and intelligible general rule; whereas if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil.

It is true, that in the case of insurance these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. And the construction of a policy can furnish no rule for the construction of this act of parliament which was passed for purposes of a different nature. Our judgment in the present case is given upon a particular ship engaged in the *Greenland* whale fishery, and with reference to her particular state at the time. It
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is not necessary to give any opinion upon particular cases of ships fitted out in a different manner or for other fisheries, until some question arising out of such a case shall come judicially before us.

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The judgment of the Court is to be entered for the defendants. And it is a satisfaction to us to know, that the state of the record is such as to furnish an opportunity of correcting our judgment if it be erroneous.

Judgment for the defendants.

WOOLLEY and Others, Assignees of the Estate and Effects of DOWMAN and OFFLEY, Bankrupts, against JENNINGS and Another.

Thursday,
January 26th.

TROVER for several bills of exchange. Plea, not guilty. At the trial before *Abbott C. J.*, at the *London* sittings after last *Michaelmas* term, it appeared, that on the 20th of *January* 1828, the bankrupts gave to the defendants a warrant of attorney, with the following defeazance: "The within warrant of attorney is given to secure the payment of the sum of 4000*l.*, with lawful interest thereon." On the 4th of *October* 1828 judgment was entered up on the warrant of attorney, and a *fieri facias* issued, under which the bills of exchange in question were seized. On the 29th of *October* *Dowman* and *Offley* became bankrupts. Between the 20th of *January* and the 4th of *October* 1828 the bankrupts, in the course of their dealings with the defendants, had paid into their hands a larger sum than 4000*l.*, and it was thereupon contended, that the warrant of attorney was discharged: but the Lord Chief Justice was of a

Where a warrant of attorney was given with a defeazance, stating it to be given "as a security for 4000*l.* and lawful interest thereon." Held, that it was to be construed as a continuing security, and not merely as a security for money then due.

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different opinion, and the jury found a verdict for the defendants.

The *Attorney-General* now moved for a rule nisi for a new trial. The sum secured by the warrant of attorney was paid off before judgment was entered up. Sums amounting in the whole to much more than 4000*l.* were paid by the bankrupts into the hands of the defendants, between the 20th of *January* and the 4th of *October*. There was a running account between them, the monies paid in were, therefore, to be applied to the first items of the account, nothing to the contrary having been said when the money was paid: In such case, the party receiving the money has no right to appropriate it to the discharge of any particular items; *Clayton's case (a)*, *Bodenham v. Purchas (b)*. If no warrant of attorney had been given, it is clear that the payments would have been considered applicable to the first items of the account; and it seems difficult to understand how that should be altered by giving a collateral security.

Per Curiam. In *Kirby v. Duke of Marlborough (c)* Lord *Ellenborough* said, "This is a bond given by the surety, as an indemnity for advances to a definite amount; it is the same as if the surety had expressed that the bankers might lend to the amount of 3000*l.*; and when the advance was made to that amount, the guarantee became *functus officio*, and was not a continuing guarantee." This case is very different; there is nothing on the face of the warrant of attorney or the defeazance to shew that it was intended to secure the

(a) 1 *Mer.* 572.(b) 2 *B. & A.* 39.(c) 2 *M. & S.* 18.

balance existing at the time when it was given. In the absence of any thing to shew such an intention, it must be construed as a continuing security.

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JENNINGS.

Rule refused.

RIPLEY and Another *against* SCAIFE.

Thursday,
January 26th.

ASSUMPSIT on a charter-party, with a penalty of 1500*l.* for non-performance. There were several special counts claiming the penalty, and the money counts. It is, however, unnecessary to state the former, as nothing ultimately turned upon them. Plea, non-assumpsit. At the trial before *Abbott C. J.*, at the *London* sittings after last *Michaelmas* term, it appeared, that the defendant was owner of the ship *Alliance*, and had, on the 21st of *June* 1821, entered into a charter-party with the plaintiffs, whereby it was mutually agreed between them, that the said vessel should, at the owner's expence, be made, and during the voyage be kept tight, staunch, and strong, and well found, and provided, &c. and should take on board at *Liverpool*, from the freighters, a cargo not exceeding, &c. and without delay, set sail and proceed to *St. Thomas*, and make delivery according to bills of lading, and should then take in other goods for *St. Domingo*, and make delivery there; and after such delivery the said ship should, at the owner's expence, be immediately made ready to perform her homeward voyage, &c. And the freighters agreed that they would pay to the owner for the freight of the said vessel after the following rate; namely, the sum of 200*l.* *British* sterling per month for six months certain;

By a charter-party, the freighter of a ship agreed to pay for her 300*l.* per month for six months certain, and so in proportion for any longer time that she might be in his employ. The ship was to be kept in repair by the owner. Before the termination of the voyage for which the ship was chartered, certain repairs were necessary, which occupied a period of twenty-eight days: Held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight.

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*Rivers
against
Seaton*

and so in proportion for any longer time she might be employed. The said pay to commence from the 25th day of *July* then next, or should the vessel sail from *Liverpool* before that day, then the pay should commence from the day of sailing, and so continue until her arrival into dock at the homeward port of discharge; and should *London* be the port of discharge, then the freighters were to pay 100*l.* more. The vessel having taken in a cargo sailed for *St. Thomas* and thence for *St. Domingo*; at the latter place some repairs were necessary, they were done at the expence of the owners, and occupied a period of twenty-eight days. On the homeward voyage the captain was to call for orders at *Cork*, but was driven into *Liverpool* by tempestuous weather. At *Liverpool* other repairs were done which detained the vessel ten days. She then sailed for *London*, arrived there on the 9th of *April*, and delivered her homeward cargo in the *West India Docks*. The defendant demanded freight for the whole time from the vessel's first departure from *Liverpool* until her arrival in *London*, including the two periods of twenty-eight and ten days, occupied in repairing the ship; and the plaintiffs were obliged to pay the money, in order to obtain possession of their goods. For the defendant it was contended, that the time during which the freight was payable was to be computed from the sailing to the return of the vessel; and that there being no stipulation for deducting any days that might be occupied in repairing the ship, the plaintiffs had paid no more than the defendant was entitled to receive. The Lord Chief Justice was of that opinion, and the jury under his direction found a verdict for the defendant.

Scarlett now moved for a new trial, and contended, that the charter-party had not been properly construed. In the first part of that instrument it was agreed that the vessel was to be kept in repair at the expence of the owner, and afterwards that the freighters should pay freight at the rate of 200*l.* per month for six months certain, and so in proportion for any longer time she might be employed. Now if the freighters are bound to pay freight for the period of time consumed in repairing the vessel, the repairs will in effect be done at their expence, and not at the expence of the owner. And the ship not being under the control of the freighters during the progress of the repairs, cannot be considered to have been in their employ at that time. They were, therefore, improperly charged with freight during that time, and are entitled to recover in this action the money which they were compelled to pay, in order to obtain possession of the cargo.

ABBOTT C. J. I am of opinion that the plaintiffs were liable to pay the whole sum demanded for freight, and, consequently, that they cannot recover any part of the money paid by them on that account. There is in the charter-party an express stipulation for the payment of freight from a certain day, for six months certain; and so much longer as the vessel should be employed by the plaintiffs. There not being any other stipulation for the case of repairs, I think that the ship was in the employ of the plaintiffs whilst those repairs were going on, and that they were liable to pay freight during that period.

BAYLEY J. The construction contended for depends entirely upon the use of the equivocal word *employment*.

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against
SCARLETT

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~~Barley~~
 against
 Scaire.

The law would imply a stipulation on the part of the owner to keep the vessel in repair; and, therefore, the introduction of that undertaking into the charter-party does not affect the question. But the payment of freight is to commence from a certain day, *and so continue*, until her arrival into dock at the homeward port of discharge. That shews the understanding to have been, that the vessel should be considered in the employ of the plaintiffs, and that they should pay freight during the whole period of her absence from this country.

LITLEDALE J. (a) concurred.

Rule refused. (b)

(a) *Hobroyd J.* was in the Bail Court.

(b) See *Havelock v. Geddes*, 10 East, 555.

Thursday,
 January 26th.

BAXTER and Another *against* The Earl of PORTSMOUTH.

Where a tradesman supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before and at the time when the goods were ordered and supplied:

Held, that this

was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders and supplied the articles, not having any reason to suppose that the defendant was a lunatic.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial before *Abbott C. J.*, at the *Westminster* sittings after last *Michaelmas* term, it appeared, that the defendant, between the years 1818 and 1823, had hired carriages, &c. of the plaintiff, and had thereby incurred the bill for which the action was commenced. It was proved that the carriages were constantly used by the defendant, and were suitable for a person of his rank and station. For the defendant it was proved, that by an inquisition dated the 28th Fe-

bruary

bruary 1823, taken under a commission of lunacy, it was found, that the defendant then was, and from the 1st of *January* 1809, continually had been of unsound mind, not sufficient for the government of himself, &c.; and it was then urged, that at the time when the carriages were hired of the plaintiffs, the defendant was incapable of making any valid or binding contract. The Lord Chief Justice was of opinion, that as the articles hired were suitable to the station and fortune of the defendant, and as the plaintiffs, at the time of making the contracts, had no reason to suppose him of unsound mind, and could not be charged with practising any imposition upon him, they were entitled to recover; and under that direction the jury found a verdict for the plaintiffs, but the defendant had leave to move to enter a nonsuit; and now

1826:

BAXTER
against
The Earl of
PORTSMOUTH.

Brougham moved for a rule nisi for that purpose. It is certainly laid down in *Beverley's* case (a) that no man shall be, in any plea to be pleaded by him, received by the law to stultify himself. But in a subsequent part of the same case there is this passage: "Suppose, then, an idiot above the age of twenty-one years, makes a feoffment in fee of his inheritance, if you ask how and in what manner it may be avoided during his life? I answer, that if it is found by office at the king's suit that he was idiot, a nativitate, and that he has aliened his lands, then, upon a sci. fa. against the alienees, the land shall be seized into the king's hands." And afterwards it is said, "For in this case the idiot, in no plea that he can plead, shall disable or stultify himself; but all this is found

(a) 4 Co. 123.

1826.

BARTEL
against
The Earl of
Portsmouth.

by office by the inquisition and verdict of twelve men at the king's suit, who are not concluded to speak the truth." And *Co. Lit.* 247 a. is to the same effect. If the party be found idiot, that relates to his birth; if lunatic, it relates to the time when he is found to be so; *Com. Dig. Idiot*, D 4. 1 *Cha. Ca.* 118. In this case the defence set up was, the finding of twelve men under a commission to enquire whether the defendant were lunatic or not. [*Bayley J.* Is there any instance in which lunacy has been admitted as a defence to an action for necessities?] The cases do not warrant any such distinction, and in several an inquisition has been held admissible, although not conclusive evidence, to establish the lunacy of the defendant, as an answer to the action, *Sergeson v. Sealey* (a), *Yates v. Boen* (b), *Faulder v. Silk* (c).

ARBOTT C. J. I was of opinion at the trial that the evidence given on the part of the defendant was not sufficient to defeat the plaintiffs' action. It was brought to recover their charges for things suited to the state and degree of the defendant, actually ordered and enjoyed by him. At the time when the orders were given and executed Lord *Portsmouth* was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would be cases of imposition; and I desired that my judgment

(a) 2 *Atk.* 412.(b) 3 *Str.* 1104.(c) 3 *Camp.* 196.

might

might not be taken to be that such contracts would bind, although I was not prepared to say that they would not. Upon further consideration, I find no reason for thinking that my direction to the jury was erroneous, or that the verdict should be disturbed.

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Harmon
against
The Bank of
Paisley.

The other judges concurred.

Rule refused.

STOCKDALE *against* ONWHY.

Friday,
January 27th.

CASE, for publishing and exposing to sale, and selling, without the consent of the plaintiff, divers, to wit, 5000 copies of a certain work called *The Memoirs of Harriette Wilson*, copied from a book which the plaintiff had printed, and of which he was the first publisher. Plea, not guilty. At the trial before Abbott C. J., at the Westminster sittings after last Michaelmas term, it appeared that the work in question professed to be a history of the amours of a courtesan, that some parts of it were libellous upon individuals, and other parts very licentious. The Lord Chief Justice was of opinion that such a work was not entitled to the protection of the law, and directed a nonsuit; and now

The first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition.

Brougham moved for a rule nisi for a new trial. The doctrine that a publisher can have no property in such a work as that which the defendant is alleged to have pirated, rests entirely upon the dictum of Eyre C. J., in a case tried before him at Warwick. In *Walcot v. Walker*

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Southey v. Sherwood
 against
Grove v. ...

Walker (a), and *Southey v. Sherwood* (b), Lord Eldon relied upon it, when he refused to grant an injunction to restrain the sale of copies of what he considered immoral works. The cases in equity cannot weigh much against the present claim, they leave the question of law quite where it was before; for it is one thing to refuse the special protection of an injunction, and another to say that there can be no property in the book. The case tried before *Eyre* C. J. is not regularly reported, but an account of it is given by the counsel in *Southey v. Sherwood*; and it is plain that the dictum of *Eyre* C. J. was not well founded in law. Dr. *Priestley* brought an action against the hundred for damages sustained by him, in consequence of the riotous proceedings of a mob at *Birmingham*; part of the property alleged to have been destroyed consisted of unpublished manuscripts. On behalf of the hundred it was said, that the plaintiff was in the habit of publishing works injurious to the government; but no evidence was produced. *Eyre* C. J. said, if any such evidence had been produced he should have held it fit to be offered. Now it is quite clear that such evidence would not have been admissible; at all events it ought to have applied to the works alleged to have been destroyed, and not to the general character of the plaintiff's writings. That dictum, therefore, is not entitled to much weight. There is another case, *Fores v. Johnes* (c), which may, perhaps, be considered as making against the present plaintiff, but in the first place there was no judicial decision in that case, for it terminated in a reference; and, secondly, it could not be presumed that the de-

(a) 7 Ves. jun. 1.

(b) 2 Mer. 435.

(c) 4 Esp. 97.

defendant's order for *all caricatures* extended to those of an immoral tendency, and, consequently, he was not liable to pay for any of that description. It is impossible to say that the plaintiff cannot have property in this work for any purposes. There can be no doubt that stealing it would be larceny. [*Littledale J.* There might be an actual property in the paper upon which it is printed; but the copyright is an ideal property.] In *Hime v. Dale (a)*, it appears to have been the opinion of Lord *Ellenborough* that in such cases an action is maintainable, although the plaintiff may be entitled to nominal damages only. The object with which the Courts have been inclined to refuse their protection to such works, has been to put them down, but it seems clear that the sale must be increased by allowing the publication of pirated editions. And, accordingly, we find conflicting opinions as to the propriety of granting injunctions to restrain piracy. The *Beggar's Opera* has never been considered a very moral production; another opera, called *Polly*, was composed by the same author, but the performance of it was prohibited; it must, therefore, be presumed to have been more immoral than the former, yet Lord Chancellor *Talbot* granted an injunction to restrain the sale of a pirated edition. Upon the whole, therefore, it appears that there is not any decision of a court of law against the present action, and that in equity there are conflicting opinions of different Chancellors as to the expediency of granting injunctions in such cases.

ABBOTT C. J. This was an action brought for the purpose of recovering a compensation in damages for

(a) 2 Comp. 27.

the

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Subscribed
against
Onward

1836.
 Defendant
 against
 Plaintiff.

the loss alleged to have been sustained by the publication of a copy of a book which had been first published by the plaintiff. At the trial it was in proof that the work professed to be a history of the amours of a courtesan, that it contained in some parts matter highly indecent, and in others matter of a slanderous nature upon persons named in the work. The question then is, whether the first publisher can claim a compensation in damages for a loss sustained by an injury done to the sale of such a work. In order to establish such a claim, he must, in the first place, shew a right to sell; for if he has not that right, he cannot sustain any loss by an injury to the sale. Now I am certain no lawyer can say that the sale of each copy of this work is not an offence against the law. How then can we hold that by the first publication of such a work, a right of action can be given against any person who afterwards publishes it? It is said that there is no decision of a court of law against the plaintiff's claim. But upon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice, this action cannot be maintained. It would be a disgrace to the common law could a doubt be entertained upon the subject; but I think that no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion. As to the cases in equity, it is admitted that they are no authority for us. One person of great authority and talents may think the publication of such a work will be most effectually restrained by granting an injunction. Another of equal authority and equal talents may think that the same object will be best attained by holding that there can be no property in the work; for the inducement to become the publisher will

will be less if other persons may copy and publish the book, gain being the object of the publisher. Which of these is the better opinion it is not for us to say; each learned person has acted upon his own judgment, each having in view the restraint of the publication. Each would act upon the rules of the common law, but would act upon them in such a manner as in his judgment was best calculated to effect that restraint.

1836.
STOCKDALE
against
GOWNEY

BAYLEY J. In *Southey v. Sherwood*, the Lord Chancellor says, that if a work be not innocent, in such a sense as that an action would not lie in case of its having been published by the author and subsequently pirated, the courts of equity will not grant an injunction. It was, therefore, plainly his opinion, that unless a work were innocent, no action at law could be maintained against a person pirating it. That opinion appears to me perfectly correct; I therefore agree that the nonsuit in this case was right.

HOLROYD J. The ground of action upon which the plaintiff proceeds, is an alleged injury to his supposed right of publication. But I am at a loss to know how any such injury can be sustained, if the work be such that he has no right to publish it. In my judgment it would be preposterous for a court of law to say that a right of action is acquired by being the first publisher of a book, when that publication is liable to be punished as a grievous offence; and no one can doubt that the publication of the work in question was such an offence.

LITLEDALE J. It has been doubted whether the privileges of copyright are given by the common law,
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STOCKDALE
against
ONWHYM.

or by the statute 8, *Ann. c. 19*. But however that may be, the foundation of the right is shewn by the recital in that statute; "Whereas, printers, booksellers, &c. have of late frequently taken the liberty of printing, reprinting, and publishing books and other writings without the consent of the author or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: be it enacted, &c." Now it is plain that no such foundation for the right exists when the very publication of the book is an offence against the law.

Rule refused.

Saturday,
January 28th.

After judgment by default against one of two defendants, the plaintiff may, upon the trial of an issue joined by the other defendant, elect to be nonsuited.

MURPHY against DONLAN and MARSHALL.

ASSUMPSIT upon a bill of exchange. The defendant, *Marshall*, suffered judgment by default. The defendant, *Donlan*, pleaded the general issue. At the trial before *Abbott C. J.*, at the *London* sittings after last *Michaelmas* term, the plaintiff elected to be nonsuited. It was objected, however, by the defendant's counsel, that as this was a joint action against several defendants, and one had suffered judgment by default, the plaintiff could not be nonsuited as to one of them only; but such defendant must have a verdict; *Tidd's Practice*, 6th edition, p. 908., *Hannay v. Smith (a)*, *Weller v. Goyton and Walker (b)*, and *Harris v. Butterley (c)*, were cited as authorities in support of that position. The Lord Chief Justice directed a nonsuit, but gave the defendant leave to move to enter a verdict for him, if the Court should be of opinion that the plaintiff could not be nonsuited.

(a) 5 T. R. 602.

(b) 1 Burr. 358.

(c) *Cowp.* 483.

Gurney now moved accordingly, and relied upon the authorities cited at the trial.

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MURPHY
against
DONLAN.

ABBOTT C. J. When we consider the ground and foundation of the judgment of nonsuit, and the situation of a plaintiff, where one of several defendants suffers judgment by default, it will appear that there is no inconsistency in allowing a plaintiff to be nonsuited, as to the defendant who has pleaded, although the other defendant may have suffered judgment by default. The entry on the postea in the case of a nonsuit is as follows: "The jurors having withdrawn from the bar to consider of their verdict, after they had considered and agreed among themselves, they returned to the bar to give their verdict, upon which the plaintiff, being solemnly called, comes not, nor doth he prosecute his bill or writ against the defendant." This is the formal entry of a nonsuit on the postea. The ancient practice^(a) (which I remember to have prevailed in some places) was for the officer of the court to ask the jury, after they had considered of their verdict, if they were agreed in their verdict. If they answered in the affirmative, the officer then called the plaintiff by name to hear the verdict; and if he appeared the verdict was pronounced. If he did not appear to prosecute his suit he was nonsuited. Judgment by default is either by non sum informatus, or nil dicit. In the former case, the defendant's attorney having appeared, says that he is not informed of any answer to be given to the action. In the latter the defendant himself appears, but says nothing in bar or preclusion thereof, and the judgment proceeds: "Whereby the said A. B. remains

(a) This practice prevailed at Bristol within these last twenty years.

1826.

~~Murray~~
~~against~~
~~Murray~~

undefended, wherefore the plaintiff ought to recover his damages." Now that being the nature of the judgment by default, I cannot see that it is inconsistent for a plaintiff, who has obtained such a judgment against one of several defendants, to say that he will not further prosecute his suit against another defendant. That being so, I think the plaintiff was properly nonsuited in this case.

HOLROYD J. I am of the same opinion. A verdict against a plaintiff cannot be taken but in his presence, but a verdict against a defendant may be taken in his absence. The rule has certainly been understood to be as it is laid down in *Tidd's Practice*; but it is a rule not founded upon any principle.

Rule refused.

Saturday,
 January 28th.

WHITTINGTON *against* GLADWIN.

Words of an innkeeper imputing insolvency are actionable, although at the time when they were spoken an innkeeper was not subject to the bankrupt laws.

DECLARATION stated, that the plaintiff was an inn and tavern-keeper, and carried on that trade and business with integrity, &c. always punctually paying and discharging his just debts: by means whereof plaintiff had acquired and was honestly acquiring great gains and profits in his said trade and business; yet defendant, well knowing, &c., spoke of and concerning the plaintiff in the way of his said trade and business, the following words: "You have been a pauper ever since you have lived in the parish; you are now a pauper. I have paid 20*l.* a year towards your maintenance; you will be in the bankrupt list in less than twelve months." The plaintiff having obtained a verdict,

Murray

Marryat now moved in arrest of judgment; on the ground that the words, at the time when they were spoken, were not actionable, inasmuch as an inn-keeper was not then liable to the bankrupt laws. He cited *Collis v. Malin* (a), *Smedley v. Heath* (b), and *Viner's Abr. tit. Action for Words*, U. a. pl. 18. in margin, where it is said by *Wray C. J.*, that to call a man a bankrupt generally is not actionable, but to call a merchant so is actionable.

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WHITTINGTON
against
GLADWYN.

ABBOTT C. J. The plaintiff's right of action in this case is founded on the principle, that the words alleged in the declaration are injurious to him in his special character of an inn-keeper. The single question, therefore, is, whether words imputing an inability to pay debts be injurious to a person who seeks his living by buying provisions upon credit and selling them again to his guests at a profit, he not being liable to the bankrupt laws. Now such an imputation is calculated to prevent him from having that credit which is at least useful, if not necessary, in his business; the words, therefore, are likely to be injurious to him. In *Southam v. Allen* (c) the following words spoken of an inn-keeper were held, after verdict and much debate, to be actionable: "Deal not with the plaintiff, for he is broke; and there is neither entertainment for man or horse." According to all the principles upon which such an action for slander is maintainable, and upon that authority, I am of opinion that this action is well brought.

BAYLEY J. *Read v. Hudson* (d) is an authority to shew that words imputing to a tradesman insolvency and

(a) *Cro. Car.* 282.(b) 1 *Lev.* 250.(c) *Sir T. Raym.* 277.(d) 1 *Ld. Raym.* 610.

1826. not bankruptcy, are actionable. There, the words were spoken of a laceman, but it was not averred that he was subject to the bankrupt laws.

WHITTINGTON
against
GLADWIN.

Rule refused. (a)

(a) See *Best v. Loil*, *Vin. Abr. Action for Words*, (U. a.) pl. 6.

Saturday,
January 28th.

The KING against DOWNES.

Where a charter incorporated "the men, free burgesses of the borough of C.," and declared that for ever thereafter there should be within the borough to be chosen out of the free burgesses eighteen common councilmen, and then nominated eighteen persons to be the first common councilmen: Held, that this charter virtually made them free burgesses also.

QUO warranto information, for usurping the office of a free burgess of the borough of Colchester. Plea, that his late majesty, by a charter, in the 58th year of his reign, at the humble petition of the burgesses of Colchester, did will, grant, ordain, constitute and declare, that the said borough of Colchester might and should be and remain for ever thereafter a free borough of itself, terminated by all its ancient metes and bounds, and that the men, free burgesses of the same borough, by whatsoever name or names of incorporation, they had theretofore been incorporated and called, should and might be for ever thereafter one body politic and corporate in deed and in name, by the name of The mayor and commonalty of the borough of Colchester, in the county of Essex. And his said majesty, by the said charter, declared, that for ever thereafter there should and might be, within the said borough, to be nominated and chosen out of the free burgesses of that borough, in manner after mentioned, one who should be called the mayor, eleven others who should be called aldermen, eighteen others who should be called assistants, and eighteen others who should be called the common councilmen of the borough, and which said mayor should likewise be an alderman of the borough. That every common

common councilman to be chosen in manner therein-
after expressed, should take his corporal oath, before
the mayor and two aldermen, faithfully to execute the
office. The plea then set out part of the charter, no-
minating the first mayor, eleven aldermen, eighteen
assistants, and eighteen common councilmen, of whom
defendant was one, and averred that the charter was
accepted, and that afterwards, and before the defendant
took upon himself the office of common councilman, he
took the oath prescribed by the charter, and then took
upon himself the said office, by reason of which said
several premises the said defendant then and there be-
came and was, and from thence hitherto hath been and
still is, a free burgess of the said borough, &c. De-
murrer and joinder.

1826.

The King
against
Downes

Jessopp for the crown: There is nothing upon the
face of this record to shew that the defendant is a free
burgess of *Colchester*. The being nominated to the
office of common councilman cannot make him also a
free burgess, unless the charter contains some stipu-
lation to that effect. But nothing of the kind is stated
in the plea. [*Bayley* J. Out of whom are the common
councilmen to be elected?] *Thereafter* out of the free
burgesses, and although persons thereafter elected com-
mon councilmen may not cease to be free burgesses;
yet it by no means follows that the persons originally
nominated to the former office, are to enjoy also the
privileges of the latter.

Chitty, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion, that the defendant
has by his plea shewn a good title to the franchise of a

1826.
Callan v. Callan
The KING
against
BOWEN.

free burgess of this borough. It appears that his late majesty, at the petition of the burgesses of *Colchester*, ordained that it should thereafter be a free borough, and that the men, *free burgesses of the borough*, should be for ever thereafter a body corporate, by the name of the mayor and commonalty of the borough of *Colchester*. The corporation was, therefore, to consist of the men, free burgesses of the borough. By the same charter his late majesty declared, that for ever thereafter there should be within the borough, to be nominated and chosen out of the free burgesses, one mayor, eleven aldermen, eighteen assistants, and eighteen common councilmen. Nothing can more clearly indicate an intention that at least every future common councilman should be a free burgess. The plea then shews that the defendant was nominated one of the first eighteen common councilman, and that he took the oath prescribed by the charter. I think we are bound to suppose that his late majesty, by appointing the defendant to an office which it was his declared intention that no one but a free burgess should fill, at the same time virtually made him a free burgess. Were a different construction put upon the charter, it would follow, that, in a corporation consisting of free burgesses, not one officer of the borough could be entitled to exercise the franchise of a free burgess. This would be such an extraordinary state of things that we cannot imagine it was intended to exist. I therefore think we are bound to hold, that the defendant is entitled to the privileges of a free burgess, and our judgment must be in his favor.

Judgment for defendant.

1826.

The Governor and Company of the Bank of
ENGLAND against DAVIS. (a)

Tuesday,
January 31st.

(In Error.)

THIS was a writ of error upon a judgment of the Court of Common Pleas in a special action on the case, for breach of duty in permitting a transfer of stock without the authority of the plaintiff below, *Davis*, and for refusing to pay him the dividends thereon. The second count of the declaration stated, that before the time of the committing of the grievances thereafter next mentioned, the plaintiff was lawfully possessed of a certain other large sum, to wit, 10,000*l.* 3 per cent. consolidated annuities, which said last mentioned stock, before the time of the committing of the said last mentioned grievances, was in the care of the defendants, and standing in the public books of the defendants in the name of the plaintiff, for the purpose, amongst other things, of paying to the plaintiff, or to such person or persons as he should legally appoint for that purpose, all the dividends, interest, and produce which might and should accrue due for and in respect of the said last mentioned stock, whilst the same should not be transferred to any person or persons in the said books with the order and authority of the plaintiff; and that before

In an action against the Bank of England, the declaration stated that the plaintiff was lawfully possessed of certain 3 per cent. annuities in the care of the defendants, and standing in their books in the name of the plaintiff, for the purpose, amongst other things, of paying him all the dividends which might accrue due in respect of the stock, whilst the same should not be transferred in the said books with the authority of the plaintiff, and that the plaintiff was entitled to the stock, and that it had not been transferred in the books to any person by his order or authority,

and thereupon it became the duty of the defendants to pay to the plaintiff the dividends whilst the same was not transferred, yet the defendants, although requested, had not paid them: Held, upon error, that this declaration was bad, on the ground that it did not appear that the dividends had ever been issued by government to the Bank, and that until they were issued, it was not the duty of the Bank to pay them.

(a) 2 Bing. 393.

and

1826.

The Bank of
ENGLAND
against
DAVIS.

and at the time of the committing of the grievances thereafter mentioned, the plaintiff was entitled to the said last mentioned stock, and the same had not been nor was transferred in the said books to any person or persons, with the order or authority of the plaintiff; and thereupon, by reason of the premises in that count mentioned, the defendants became and were liable, and it became and was their duty to pay to the plaintiff, or to such person or persons as he should legally appoint for that purpose, all the dividends, interest, and produce, which might and would accrue due, for and in respect of the said last-mentioned stock, whilst the same was not transferred in the said books to any person or persons, with the order or authority of the plaintiff." A request to pay the dividends on the 30th of September 1820, and a refusal by the bank, was then averred. The fourth count was the same as the second, except that it applied to dividends due in respect of 178*l.* 18*s.* long annuities. The Court of Common Pleas having given judgment for the defendant in error on the second and fourth counts of the declaration, after argument upon a special case, the facts stated in that case were afterwards stated in a special verdict, and the record being removed by writ of error into this court, it was now objected by *Bosanquet* Serjt. for the plaintiff in error, that it was not alleged in the declaration, nor found as a fact in the special verdict, that any money had ever been issued by government to the bank for the purpose of paying the dividends.

On the other hand it was urged by *Tindal*, who observed, that this point had not been made in the court below; that it must be presumed that the government had

had issued money to the bank for the purpose of paying the dividends.

1826:

The Bank of
ENGLAND
against
DAMES.

Per Curiam. We can only decide upon the facts stated upon the record. The second and fourth counts of the declaration upon which the Court of Common Pleas have given judgment in favor of the defendant in error, represent the duty of the bank to be to pay the dividends. Now it could not be the duty of the bank to pay the dividends until they had received them from government. There is no allegation in the declaration that the bank ever had received the dividends from government, nor is there any fact found by the jury to cure the want of that allegation. Without saying what would have been our decision if that fact had been alleged or found by the jury, we are of opinion, that the second and fourth counts of the declaration are not sufficient, and that the judgment must on that ground be reversed.

Judgment reversed.

1826.

Tuesday,
January 31st.

BELL *against* SMITH and Others.

(In Error.)

Where a declaration on a policy of assurance on goods, averred that it was effected in the names of the plaintiffs, as agents, and that *A., B., C., and D.*, were interested in the goods to the full amount insured, and that the policy was effected on their account and for their sole use and benefit, *A.* being called as a witness for the plaintiffs, was objected to, and thereupon they gave in evidence a deed poll executed by *A.*, before the commencement of the action, whereby he released to the plaintiffs all actions which he might have by reason of the policy, or for any monies to be recovered by them from the underwriters. They also gave in evidence an indenture, executed by *A.* after the commencement of the action, whereby (after reciting that plaintiffs had effected the policy; that *A., B., C., and D.* were the persons interested; that actions had been commenced in the names of the plaintiffs; and that they being desirous of an indemnity against the costs, the Court of C. P. had ordered *A., B., C., and D.* to indemnify, and that *L. and R.* had agreed to do it), *A., B., C., and D.*, in consideration thereof and of 10*s.*, assigned to *L. and R.* all their interest in the policy, and all benefit to be derived therefrom, and all monies to be recovered in the said actions, to and for their own exclusive use and benefit:” Held, that *A.* was, at all events, still liable to the attorney employed to bring the action, and therefore incompetent.

Semble, That the assignment to *L. and R.* was illegal, as maintenance.

ASSUMPSIT on a policy of insurance on goods by the ship *Friendship*. Total loss by perils of the sea. The declaration averred that *Armet, Gibb, Robertson, and Wimble* were, at the time of making the policy, and thence until and at the time of the loss, interested in the said goods to the whole amount insured, and that the policy was made on the goods, to and for the use and benefit and on the account of *Armet, Gibb, Robertson, and Wimble*. Plea, non-assumpsit. At the trial before *Burrough J.*, at the *London* sittings after *Trinity* term 1824, the plaintiffs (below) proved, amongst other things, the allegations above set forth, and then tendered *Armet* as a witness. He was objected to as incompetent, on the ground of interest, and thereupon the plaintiffs gave in evidence a deed-poll (executed before the commencement of the action) whereby he released to the plaintiffs “all actions, claims, &c. which he had or might have against them by reason of the said policy of insurance, or for or on account of any monies to be recovered by them from the underwriters.” They also gave in evidence an indenture of the 11th of

June

June 1822 (after the commencement of the action) made between *Armet*, *Gibb*, *Robertson*, and *Wimble* of the first part, the plaintiffs of the second part, and *Lachlan* and *Robertson* of the third part; whereby (after reciting that the plaintiffs had effected the policy in question, and that *Armet*, *Gibb*, *Robertson*, and *Wimble* were the persons interested in it, that actions had been commenced against the underwriters in the names of the plaintiffs, the deed-poll before set out, executed by *Armet*, that plaintiffs being desirous of an indemnity against the costs of the actions, the Court of Common Pleas had ordered *Armet* and the other parties of the first part to indemnify the plaintiffs, they giving up all claim upon the assured for such costs, and that *Lachlan* and *Robertson* had agreed to enter into the covenants thereafter contained, and the plaintiffs had agreed to accept such indemnity, and release the assured from all claim on account of such costs) it was witnessed, that, in consideration of the assignment thereafter made by the assured, and of 10s. paid by the plaintiffs, they, *Lachlan* and *Robertson*, covenanted to indemnify the plaintiffs against all costs of the said actions; and further, that in consideration of 10s. paid by the assured to the plaintiffs, they released the assured from all claims on account of such costs. And the assured, in consideration of 10s., did assign to *Lachlan* and *Robertson* all their right, title, and interest of, in, to, or under the said policy of assurance, and all benefit to be derived therefrom, for their own proper use and benefit, and that all monies to be recovered in the said actions should be received for and on account of *Lachlan* and *Robertson*, and for their own exclusive use and benefit." *Armet* was then examined on the voir dire, and stated, that at the time of the voyage in the declaration mentioned, he was interested

1826.

 Bell
 against
 Bell

1826.

*Bell
against
Smith.*

in the ship and goods; that the accounts of the concern had not been settled but were still open; but that he did not know of any debt outstanding from the concern; that the plaintiffs were agents for the witness and the other part owners in effecting the policy, and that it was effected on their account. The learned Judge overruled the objection to the witness, and he was thereupon examined for the plaintiffs, and they obtained a verdict. A bill of exceptions was tendered and sealed by the learned Judge, and the record having been removed into this court by writ of error, the case was now argued by

Campbell for the plaintiff in error. *Armet* was improperly admitted as a witness in the court below. He was incompetent on three grounds; first, he was substantially a party on the record; secondly, he had a direct interest in the event of the suit; and, thirdly, the verdict, if found for the plaintiffs, might be given in evidence for him; or if for the defendant, against him in another action. First, *Armet* was substantially a party on the record. The policy was effected by brokers, as agents for *Armet* and his co-assured, by their order, and at their expence. The brokers had no interest in the contract, and if the action had been in the names of the assured, the brokers might have been called as witnesses for them. Now wherever it clearly appears that an action is brought in the name of one person for the benefit of another, and that the latter is the contracting party, he must be treated as the real plaintiff, *Bell v. Ansley* (a), *Smith v. Lyon* (b). So also the lessor of the plaintiff in ejectment has been treated as the real plaintiff, and on that ground he cannot be compelled to give

(a) 16 East, 141.

(b) 3 Camp. 465.

evidence

evidence for the defendant; nor can he be permitted to give evidence for the plaintiff, *Fenn v. Granger* (a). Secondly, *Armet* had a direct interest in the event of the suit; for if by means of a verdict obtained by the plaintiffs the co-assured were put in funds, they would apply them in discharge of the debts of the concern, to which *Armet* would otherwise have to contribute. The assignment to *Lachlan* and *Robertson* will be relied upon as an answer to this; but that was made during the action, and can have no operation at law; and although the assignment is general upon the face of it, yet in equity *Lachlan* and *Robertson* would be accountable as trustees for the surplus received by them after indemnifying themselves. They were not purchasers of the policy, and the recitals in the deed shew the real circumstances attending the assignment. Again, *Armet* was interested in the event of the suit, inasmuch as he was liable for the costs to the attorney employed to commence the action. The recitals in the indenture shew that it was really brought by the assured. Thirdly, the verdict and judgment in this action might have been evidence for or against *Armet* in another. If *Lachlan* and *Robertson* had re-assigned the policy, and *Armet* had sued for his own benefit, a verdict and judgment for the defendant in this case might have been given in evidence against him; and in like manner it might, if in favour of plaintiffs, have been pleaded by *Armet* to any action by the underwriters for breach of any warranty in the policy.

1826.

Barr
against
Summ.

Parke contra. None of the objections made to *Armet's* competency are sustainable. He is not to be

(a) 3 Camp. 377.

considered

1826.

See also
Bill
against
Guthrie

considered as a party to the record. The action of ejectment is very different, it is the creature of the Court, altogether founded on a fiction for the furtherance of justice; and there the lessor of the plaintiff is rightly treated as the real plaintiff. In this case the names of the persons for whom the policy was effected were inserted, in order to shew that it was not a wager policy. Where goods have been insured and sold together with the policy, in declaring upon the policy the names of the persons who ordered it are nevertheless inserted; that circumstance, therefore, does not prove that they are parties to the record. Besides, there is no technical rule rendering parties to the record incompetent as witnesses, unless they are examined in support of their own interest, *Norden v. Williamson* (a). Now *Armet* had no interest at the time when he was examined. By executing the deed poll he had released all claim on the plaintiffs for the fruits of the action, and therefore he cannot be benefited either at law or in equity. It is said that if the co-assured recover their shares *Armet* will have the benefit of that in account; but his examination on the voir dire shews that there were no out-standing debts. The deed poll seems rather to make it *Armet's* interest that the defendant should succeed; for if the plaintiffs obtain a verdict *Lachlan* and *Robertson* being entitled to receive all the benefit of the policy, *Armet* would be liable to make good to them the share which he has released to the plaintiffs. At all events, it is by no means clear that *Armet* has any interest, and therefore whatever observations may be made as to his credit, he cannot be deemed

(a) 1 Tunt. 378.

incompetent. Then as to his supposed liability to the plaintiffs' attorney, nothing of that kind was made out by the examination on the voir dire; nor is there any thing to shew by whose authority the action was commenced. Lastly, as to the verdict and judgment in this case being evidence in any other, *Armet* having assigned all his interest in the policy, cannot have any interest in another action upon it; nor could a verdict and judgment for the present defendant be given in evidence in an action by *Armet*, for it would not be between the same parties.

1826.

 BILL
 against
 SUMNER.

ANNOT C.J. I am of opinion that *Armet* was not a competent witness. There can be no doubt that originally he was substantially, although not nominally, a plaintiff in the cause; and we ought not to be astute to give effect to that which makes the real plaintiff a witness. The action being for his benefit, although brought in the names of the brokers, it must, until the contrary is shewn, be presumed that it was brought by him, and by his authority, rather than by those who had no interest in it. If the action was brought by his authority, either express or implied, he became liable to pay the attorney employed to bring it, and he is still under that liability, nothing having been done to deprive the attorney of his right to recover his costs from him. The machinery, therefore, (notwithstanding all the contrivances adopted) has still left this objection open; and upon this ground alone, without going further, I think that there is sufficient to warrant us in saying that *Armet* had an interest in obtaining a verdict for the plaintiffs. He was, therefore, improperly admitted to give evidence, and a venire de novo must be awarded.

1826.

BELL
against
SMITH.

BAYLEY J. I am entirely of the same opinion. There is abundant proof that this action was not commenced at the instance of the nominal plaintiff, but of the assured. It appears by the indenture executed by *Armet* and the co-assured, that the names of the plaintiffs were used in the action; that is, used for the benefit of the persons interested; and the Court of Common Pleas accordingly made an order upon the assured to indemnify them. The attorney, therefore, employed to bring the action has a claim upon the assured for his costs. But I think that *Armet* was incompetent upon higher grounds. The action was brought at the instance of *Armet* and three others; it was then found that they had not sufficient evidence to support it, and machinery was resorted to, calculated to introduce all the evils of champerty and maintenance. First, *Armet*, without consideration, released all his interest to the nominal plaintiffs in the suit; that was not considered sufficient; and then, in consideration of 10s., all the parties interested joined in an assignment to *Lacklan* and *Robertson*. It is difficult to put a stronger instance of maintenance or champerty. Those are unlawful, because they encourage and keep alive suits. Now that was the very object of the assignments in question; for each of the assured may be considered to have admitted, by the deed which he has executed, that without *Armet's* evidence the action was not maintainable. Upon these grounds I think that he ought not to have been admitted to give evidence.

HOLROYD J. I also am of opinion, that *Armet* was not a competent witness. The direct and express object of the assignments was, to support the action; the old law
of

of maintenance is, therefore, applicable to the transaction. But besides that, *Armet* and his co-assured were really parties to the action, as appears by the record; and upon that ground he was originally incompetent, and he could not get rid of the objection in the manner attempted. The declaration avers, that *Armet* and three other persons were interested in the goods, that the policy was made to and for their use and benefit, and on their account; and the loss is alleged to be a loss to them. This is, therefore, alleged on the record, to be the action of *Armet* and those other persons. At all events the action was afterwards adopted by them, for they gave the indemnity required by the Court of Common Pleas. They are therefore liable to the attorney employed to bring the action.

1826.

BELL
against
SMITH.

LITLEDALE J. I do not go the length of saying that *Armet* is to be considered a party to this record, in the same manner as the lessor of the plaintiff in ejectment; and perhaps he would not be liable to pay the costs of the defendant in case the latter obtained a verdict. But I think he was so far a party as to be incompetent as a witness. The recitals in the deeds executed by him shew that he was interested, not collaterally, in which case the objection may be obviated by a release, but directly, the action being brought for his benefit. I therefore agree that his evidence was improperly admitted, and that a venire de novo must be awarded.

Venire de novo awarded.

1826.

DAVID against ELLICE, J. B. INGLIS, and JAMES INGLIS, surviving Partners of JOHN INGLIS, deceased.

A., B., and C. were in partnership in trade. *A.* retired from the firm, and notice of that fact was given to *D.*, a creditor of the firm, and that *B.* and *C.* continued the business, and assumed the funds, and charged themselves with the debts of the partnership. The balance due to *D.* was transferred to his credit by the new firm, and *D.* was informed of this transfer, and assented to it. He afterwards drew upon the new firm for a part of this balance, and they accepted and paid his bills. The new firm having become insolvent, it was held, that *C.* continued liable for the debt due to *D.* from the old firm.

ASSUMPSIT for money lent, with the usual money counts. The defendant *Ellice* pleaded the general issue, and the other two defendants their bankruptcy. At the trial before *Abbott C. J.*, at the *London* sittings after *Trinity* term 1824, a verdict was found for the defendants *J. B. Inglis* and *James Inglis*, and the plaintiff obtained a verdict against the defendant *Ellice* for 13,162*l.* 5*s.* 8*d.* In the following term a motion was made for a rule to shew cause why the verdict obtained against the defendant *Ellice* should not be set aside, when the Court directed the facts to be stated for their opinion in the following case.

The plaintiff was a merchant residing in *Canada*. The defendants, and *John Inglis* deceased, carried on business as merchants in partnership together in *London*, under the firm of *Inglis, Ellice, and Co.* The plaintiff had had various dealings with that firm prior to the 30th *April* 1821. On that day the defendant *Ellice* retired from the firm, and the following circular letter was, in consequence, sent to the plaintiff and the other correspondents of the firm. "We beg to acquaint you that Mr. *Ellice* retires from our firm from the present date. The business of the house will be continued as heretofore by the remaining partners, who assume the funds, and charge themselves with the liquidation of the debts of the partnership." This circular

cular was transmitted by *Inglis* and Co. to the plaintiff, in the following letter, dated 10th *May* 1821. "The circular herewith will inform you of the recent alteration in our firm. Our business continues in other respects as heretofore, our means of carrying it on unimpaired, and we beg to assure you that your concerns in our hands will still be equally an object of our attention." On the 28th *June* 1821, the plaintiff wrote to the new firm of *Inglis* and Co. as follows: "I am favored with yours of the 10th ult., with circular of the 30th *April*, advising the change in your firm, which continues to have my full confidence. The accounts will be transferred so soon as I receive my account current, and an account opened for the new firm." Messrs. *Inglis*, *Ellice*, and Co. having been in the habit for many years of making up their *Canada* accounts to the 30th *June* annually, the account current of *Inglis*, *Ellice*, and Co. with the plaintiff was made up to the 30th *June* 1821, (and not to the 30th *April* preceding, the time of the defendant *Ellice's* retirement from the firm,) and was transmitted to the plaintiff, at *Montreal*, by the new firm of *Inglis* and Co., in the following letter, dated the 17th *July* 1821. "We enclose herein your account current balanced 30th ult. by 18,905*l.* in your favor, and at your credit in new account with our present firm. We shall be glad to hear you have received it, and found it correct." *Inglis* and Co. did not open any new books of account, but continued to keep the account with the plaintiff in the same books and in the same manner after the 30th day of *June* 1821, as it had previously been. On the 24th *September* 1821, the plaintiff wrote as follows: "The account current with your late firm is received, and with the exception of the outstanding debts of 1804, is

1826.

 DAVID
 against
 ELLICE.

1826.

DAVID
against
ELLICK.

perfectly correct, and have transferred in a new account with your present firm, whose confidence I hope I shall continue to merit." On the 3d November 1821 the plaintiff drew a bill for 5000*l.* on the new firm. This bill was advised in two letters which follow: "*Montreal*, 3d November 1821, Messrs. *Inglis* and Co. Sirs, I wrote you on the 15th and 31st ult., the former advising, if I did draw on you, it would be in favor of the *Montreal* bank. The present serves to advise of my having drawn on you of this date in favor of *Robert Griffin*, Esquire, cashier of the *Montreal* bank, at sixty days' sight, 5000*l.* sterling, which please honor. The late news of the failure of your crops will, no doubt, bring a number of bills into the market; and I expect shortly to replace this amount to advantage." — "*Montreal*, 12th December 1821, Messrs. *Inglis* and Co. Sirs, when I drew on you for so large a sum as 5000*l.* I was in hopes of replacing it ere this to advantage, instead of which bills are now 10 per cent., and the money lies in the bank without interest, which is a bad speculation." The new firm of *Inglis* and Co. continued to act as the mercantile agents and correspondents in *London* of the plaintiff, and on the 1st July 1822, *Inglis* and Co. made up and sent to the plaintiff the first account in their own names with the plaintiff to the 30th June preceding. On the 7th August 1822 Mr. *John Inglis*, the senior partner in the new firm of *Inglis* and Co., and who had been also the senior partner in the former firm of *Inglis* and Co., died, and thereupon *Inglis* and Co. suspended their payments. On the 14th of October 1822 the plaintiff wrote the following letter to *Inglis* and Co.: "Sirs, your sundry favors of the 23d, 27th, and 30th

July,

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July, 13th, 23d, 26th, and 29th *August*, came duly to hand; that of 23d *July*, covering account current, has been examined and found correct, with the exception of the outstanding debts of 1804, remarked every year. Yours of 13th *August*, conveying the melancholy tidings of the death of your senior, my old and much lamented correspondent, for whose loss I am truly sorry, and feel confident the survivors will do me every justice that my long confidence in that concern merits." On the 10th *February* 1823, the plaintiff wrote to *Inglis* and Co. another letter, as follows: "As the late firm of *Inglis*, *Ellice*, and Co. are bound to me for part of the heavy sums due me, I request you will send me a statement of that part of the amount, and also that part due me by *Inglis* and Co." To which, *Inglis* and Co., on the 3d *April* 1823, returned the following answer. "During the present unsettled state of the house, and particularly of the question respecting the respective liabilities of the old and new firms, we are advised not to attempt a separation of any accounts. You will, we doubt not, agree in this; but for your information in the meantime, we hand herewith a transcript of the account open, as it stands in our books." On the 27th *May* 1823 a commission of bankrupt issued against the defendants, *John B. Inglis* and *James Inglis*, under which they were duly declared bankrupts, and obtained their certificates. The new firm continued in credit, and carried on business to a great extent; from the time when the defendant *Ellice* retired, till the death of *John Inglis*, having made payments during that time to the amount of 1,847,000*l*. A witness, who had been a clerk in the house of *Inglis* and Co., examined on be-

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Dart
against
Ellice

half of the defendant, said, that if the plaintiff had drawn upon the new firm for the balance of his account due at the time of the retirement of the said *Edward Ellice* at any time between such retirement and the death of Mr. *John Inglis*, he had no doubt the balance would have been paid. The sum of 13,162*l.* 5*s.* 8*d.*, for which the verdict passed, is the balance due upon the account of the 30th June 1821, after giving credit for all the payments made by the new firm of *Inglis* and Co. to the plaintiff, or on his account, without taking credit for any payments made by the plaintiff to the new firm. This case was argued at the sittings in Banc, after last *Michaelmas* term, by

Campbell for the plaintiff. The defendant *Ellice* is liable to pay the whole balance due from him and his co-partners in 1821, when he retired from the firm, except so far as that balance may have been reduced by subsequent payments made by the new firm. *Ellice* was originally jointly liable as a principal; he must continue liable, unless the debt appear to have been satisfied, and it lies on the defendant to shew that he is discharged from his liability. There is no evidence of any promise by the plaintiff to release the defendant. There was a mere transfer of the balance to the debit of the new firm. That only shews that the plaintiff intended to look to them, but not that he meant to discharge *Ellice*. No new agreement was entered into between the plaintiff and defendant. Supposing that there was evidence, of a promise to discharge *Ellice*, what consideration was there for such promise? There was no benefit to the plaintiff, nor prejudice to the defendant. No new partner was introduced into the firm, so that
the

the plaintiff acquired no new security. It may be said, that there was a prejudice to *Ellice*, for he might have withdrawn his funds. But it does not appear by the case that he had left any funds in the house. Besides, the prejudice, to be a consideration, must be at the request of *Mr. David*. It may be said that the account which was delivered, in which the new firm credited him for the balance due from the old firm, and assented to by the plaintiff, shews that he consented to accept the new firm as his debtors; but that would not have the effect of discharging *Ellice*. Even if a new security had been taken from the two partners, *Ellice* would still be liable. For where, upon the dissolution of a partnership, it was agreed that all the joint bonds should be discharged by one of the partners, to whom, after the dissolution, an application was made by a partnership bond creditor, and it was agreed between such bond creditor and partner that interest upon the bond should be increased; and some of the increased interest was paid; and the partner then became a bankrupt, and the creditor received a dividend under the commission, it was held that he might proceed against the assets of the other partner for the sum due, *Heath v. Percival* (a). In *Bodford v. Deakin* (b), one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills; the separate

1836.

 DAVIS
 against
 ELICE.

(a) 1 P. Wms. 682. Str. 403.

(b) 2 B. & A. 210.

notes

1823.

Debt
against
Ellice.

notes having proved unproductive, it was held that he might still resort to his remedy against the other partners, and that the taking the separate notes, and afterwards renewing them several times successively, did not amount to a satisfaction of the debt. So where upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to a creditor, who was informed of this, and expressly agreed to exonerate the other partner from all responsibility, it was held, that these circumstances did not constitute any defence to the latter in an action by the creditor against both partners, *Lodge v. Dicos* (a). In *Newmarch v. Clay* (b) the case turned entirely on the application of payments.

Finds contra. The facts stated in the case amount to a receipt by the plaintiff of the balance due from the old firm, and a subsequent loan of that balance to the new partnership, or at least to a satisfaction on a sufficient consideration. There can be no doubt that if the money had been handed over to the plaintiff, and he had again lent it to the new firm, the defendant *Ellice* would be discharged. It appears by the case that there was a transfer of the balance from the old firm to the new firm, with the assent of the plaintiff. He was informed that *Ellice* had retired from the firm, and that the new firm would assume the funds, and charge themselves with the liquidation of the partnership debts, and by his letter of the 28th of June 1821, assented to the opening of an account with the new firm. In July 1821,

(a) 3 B. & A. 611.

(b) 14 East, 239.

the plaintiff was informed that the balance of 18,905*l.* was placed to his credit in account by the new firm, and he assented to that transfer. The partners constituting the new firm, therefore, acknowledged themselves debtors to the plaintiff for the balance due from the old firm, and he agreed to accept them as his debtors for the same, when he might have withdrawn the balance, and he did in fact draw upon them for part of that balance, treating the new firm as his debtors for the same. This amounts substantially to the same thing as if the balance had been paid over to the plaintiff, and he had lent it to the parties constituting the new firm. It is clear that in order to constitute a loan it is not essential that the money should be handed over from the lender to the borrower. In *Sturges v. Hubbard* (a) Lord Ellenborough said, that although choses in action are generally not assignable, yet where a party entitled to money, assigns over his interest to another, although the debtor may refuse his assent, any thing like an assent on the part of the holder of the money will suffice to maintain an action against him for money had and received. And even in an action for penalties under the statute of usury, the transfer of a debt from *A.* to *B.*, with the assent of the debtor, has been held to constitute a loan. *Wade q. t. v. Wilson* (b). So where *A.* sold goods to *B.*, and he being unable to pay for them, transferred them to *C.*, who promised to pay for them, this was held to be a new sale to *C.*, and not a promise by him to pay the debt of *B.*, *Browning v. Stalard* (c). If, therefore, there was any actual transfer of the debt from the old to the new firm, with the assent of the

1806.

 DAVIS
 against
 ELLENBOROUGH
(a) 4 *Exp.* 203.(b) 1 *East*, 195.(c) 5 *Trent.* 450.

plaintiff,

1826.

DAVID
GROVES
ELLICE,

plaintiff, no consideration would be required. But here there was a sufficient consideration for a promise on the part of the plaintiff to release *Ellice*. There was a benefit to the plaintiff, and a disadvantage to *Ellice*. It was to the advantage of the plaintiff, for he was permitted to draw afterwards upon the new firm for a larger sum than *they* had in their hands belonging to him. If the plaintiff had sued *them* alone, they might have pleaded in abatement. At all events there was a prejudice to *Ellice*, unless he was released. For he might have withdrawn his money before the firm failed. [Abbott C. J. It does not appear that *Ellice* left any funds in the house.] That must be collected from the case. For the plaintiff had notice that the new firm had funds to pay the creditors. These funds must have belonged to the old firm. As soon as the plaintiff was told that one partner was retiring, that was in effect the same thing as saying "you may have your money." The cases cited on the other side do not apply. In *Heath v. Percival* (a) there was an agreement to give up one, and take the other as the debtor. *Bedford v. Deakin* (b) was decided on the ground, that the party had expressly reserved his right to sue on the original bills. In *Goff v. Davies* (c), where there was no transfer of the balance or notice to the creditor that that had been done, *Wood B.* intimated a strong opinion that if the balance had been struck, and carried to the debit of the new partnership account, and the plaintiff had known of that and had assented to it, it would have operated as an agreement to release the old, and receive the new firm as his debtors. Here the balance was struck and car-

(a) *Str.* 405. 1 P. Wms. 682. (b) 2 B. & A. 210. (c) 4 Price, 200.

ried to the debit of the new firm, and that was assented, to by the plaintiff.

Cur. adv. vult,

1826.

DAVEN
against
BARNES

ABBOTT C. J. now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows: Upon this state of facts, it was contended on behalf of the defendant *Ellice*, that he was discharged from the plaintiff's demand, and three cases were quoted on his behalf. In each of those cases, some new person, not originally a debtor, had consented to become so. In the present case there is no new debtor. The only ground of defence therefore is, that the plaintiff so far assented to the request contained in the circular letter, as to change the heading of the account from *Inglis, Ellice, and Co.* to the firm of *Inglis and Co.*, and to draw a bill on the latter firm for a part of the debt, which was duly paid. Now, it is clear, that by all this the plaintiff gained nothing. But it was said that *Ellice* had sustained a prejudice, and on that account was discharged. And to support this allegation of prejudice, we were desired to presume that he had left funds belonging to himself in the hands of his former partners, which otherwise he would have withdrawn. This, however, being a matter of fact, should have been proved, and not left to presumption. And the first step in such proof would have been to shew that *Ellice* knew what the plaintiff had done. Even this was not proved. It is not necessary to consider what the effect of such proof might have been in a court of law. In the absence of such proof, we are all clearly of opinion, that *Ellice* is not discharged, and consequently that the verdict was properly taken for the plaintiff. I will only

observe

1806.

Davis
v. Persival
B. 1002.

observe further, that the facts of the present case are much less favorable to the retiring partner than those of *Heath v. Persival* (a), in which a decree was made in a court of equity against the residuary legatee of the retiring partner. The *postea* is to be delivered to the plaintiff.

Postea to the plaintiff.

(a) 1 P. W. 682.

Saturday,
February 4th.

EDWARDS against BOWEN and Another.

A plaint in replevin cannot be removed from a county court in *Wales* into this Court by certiorari.

RUSSELL had obtained a rule to quash a writ of certiorari and return, whereby a plaint in replevin had been removed into this Court from the county court of *Carmarthen*, upon an affidavit stating that no cause had been shewn to the Court for the issuing of such writ.

W. E. Taunton and *Chilton* shewed cause. It was unnecessary to lay any special ground for the issuing of the writ. The statute 5 G. 4. c. 106. s. 23. (*Welsh Judicature Act*) is applicable only to the removal of causes from the court of great sessions. Lord Chief Baron *Gilbert* lays it down, that the plaintiff in replevin may remove the plea out of the county court without cause shewn, and it is also laid down by him, and in Lord *Hale's* Commentary on *Fitzherbert*, that if a plaint be removed by certiorari when it ought to be by pone or recordari, it is well removed. *Fitzh. N. B.* 69m. note a. cites 7 Ed. 4. 23.

ABBOTT

ABBOTT C. J. It is laid down by Mr. *Tidd*, in treating of the means by which causes are removed from the inferior courts, that they are by writ of certiorari or habeas corpus from inferior courts of record, or by writ of pone, recordari facias loquelam or accedas ad curiam from such as are *not* of record. The sheriff's court for the purposes of a replevin suit, is not a court of record. According to the rule laid down, therefore, a certiorari is not the proper mode of removing this record.

The case cited from *Fitzherbert* shews, perhaps, that if a plaint be removed by certiorari, the Court may exercise its discretion whether or not to entertain it. Nothing has been urged to us to shew the propriety of coming here as it were per saltum (a). The proper course would have been to remove the plaint by re. fa. lo. into the court of great sessions, and then upon sufficient grounds the certiorari would issue to remove it thence into this Court.

Rule absolute.

(a) This course was afterwards adopted. The plaint was immediately removed by re. fa. lo. from the county court into the court of great sessions, but the term being then too far advanced to allow of the seven days' notice of motion, required by the section of the *Welsh* judicature act above cited, the application for the certiorari, instead of being renewed in this court, was made at the last seal after *Hilary* term before the Vice-Chancellor upon an affidavit, disclosing the circumstances of the case, from which it was manifest that the title to the freehold must come in question.

It was urged, in support of the application, that the mischief intended to be remedied by the twenty-third section of the act, was the delay occasioned by *defendants* suing out writs of *certiorari*; that in every form of action, except replevin, the plaintiff is at liberty to commence his suit in whatever court he pleases; and that even in replevin he may remove by re. fa. lo. without cause shewn, though the defendant can not (*Gibb. Rep.* 122.) That though the legislature has, where the matter to be litigated is of small amount, compelled the plaintiff to resort to the local jurisdiction, by depriving

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depriving him of, or visiting him with costs; yet it has in all instances, and in the present act, disclaimed any interference where the title to the freehold comes in question, and that, therefore, to shew by affidavit that the title to the freehold was in question, was to shew to the Court sufficient cause within the meaning of the act.

On the other hand, it was contended that the affidavit only went to shew that the plaintiff had a cause of action; and that the sufficient cause required by the legislature must be taken to point at some defect or partiality in the local jurisdiction.

The Vice-Chancellor made an order for the writ.

His order was appealed against, and, after a second argument, confirmed by the Lord Chancellor in *Trinity* term.

Knight and Chilton for the plaintiff.

Shadwell and Wakefield for the defendant.

Saturday,
February 4th.

TENANT *against* BROWN and Others.

JONES *against* BROWN and Others.

Where in trespass against parish officers for distraining for poor's rates, it appeared that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause, the Court stayed the proceedings until he gave security for the costs.

THESE were actions of trespass against the parish officers of *Saint Mary's, Marlborough*, for taking the plaintiff's goods under distresses for poor's rates. *Holt* had obtained rules nisi for staying proceedings until the plaintiffs' attorney should give security for costs, upon affidavits stating that the plaintiffs' attorney was the landlord of the plaintiffs, and suggesting that the rates were not paid by his desire, and that the actions were commenced without the knowledge of the respective plaintiffs, and not for their benefit, and that the attorney had indemnified the plaintiffs for their costs. By affidavits of the plaintiffs and their attorney, it was admitted that the plaintiffs were the tenants of their attorney, and held their tenements at rents free of poor rates,

rates, which were to be allowed by the landlord; that the attorney had desired them not to pay the rates, and that in consequence of their refusal the distresses in question were made. The plaintiffs affidavits further stated that they had sustained great inconvenience by their goods being detained from them for several days, and that the actions were brought by their desire, and for their benefit; that they wished the same should proceed, and were advised that they had good causes of action, but said nothing as to whether the attorney had indemnified them against the costs.

Halcomb now shewed cause. This application is quite unprecedented ; the only cases in which the Courts will interfere to stay proceedings, until security is given for costs, are cases in which the plaintiff is out of the jurisdiction of the Court, and other cases, enumerated in *Tidd's Practice*, p. 555. 6th edition, not being similarly circumstanced with the present. Admitting the plaintiffs' attorney is the only party beneficially interested in the question of the legality or illegality of the rates, and that for any thing which appears he has indemnified the plaintiffs against the costs, still the plaintiffs, having also independent causes of action for the injuries they have sustained by the wrongful taking and detention of their goods, are clearly entitled to prosecute their actions, and the Court will not interfere to take away their rights, unless a third party, over whom they have no control, should give security for costs. There is no precedent for such a decision, and it would lead to great inconvenience. Besides, if the suggestions made in the affidavits in support of the rule are true, and these actions are in fact prosecuted without the know-

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ledge and against the will of the plaintiffs, then the application ought to have been to set aside the proceedings altogether.

Holt, in support of the rule, was stopped by the Court.

BAYLEY J. (a) We are all of opinion that this rule must be made absolute. Without looking at the affidavits filed in support of the rule, we decide upon the plaintiffs' own affidavits, which admit that they refused to pay the rates by the desire of their landlord, the attorney in these actions.

HOLROYD and LITLEDALE Js. concurred.

Rule made absolute, without costs.

(a) *Abbott C. J.* was absent at *Nisi Prius*.

BOTTOMLEY *against* BOVILL.

Upon a policy of insurance upon ship at and from *London* to *New South Wales*,

THIS was an action on a policy of insurance on the ship *Brampton*, at and from *London* to *New South Wales*, and at and from thence to all ports and places in the *East Indies* or *South America*, with liberty for the said ship, in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship might proceed to, as well on this as on the other sides of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards: Held, that after the arrival of the ship at *New South Wales*, she was protected by the policy so long only as she was sailing on a voyage either to *South America* or to the *East Indies*, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to *South America* or to the *East Indies*.

places

places in the *East Indies* or *South America*, with liberty for the said ship, &c. in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship might proceed to, as well on this as on the other sides of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards. The premium was 80s. per cent., to return 28s. 6d. per cent. if the voyage ended at *New South Wales*, and 10s. per cent. if the ship proceeded to the *East Indies* and arrived. The loss in one count was averred to have been by barratry, and in another by perils of the sea. At the trial before *Abbott C. J.*, at the *London* sittings after *Hilary* term 1825, the following appeared to be the facts of the case. The ship sailed from *London* with convicts to *New South Wales*. The captain had orders (unless he should receive contrary directions from the owner) to go to *New Zealand* and take in spars there, and proceed to *South America*. The ship arrived at *New South Wales* on the 23d of *April* 1823, and did not leave that place until the 23d of *July*. She was detained there a considerable time, in consequence of several of the crew having been sent to prison for misconduct. On the 7th of *July* the captain received a letter of instructions from his owner, directing him to proceed to the *East Indies* instead of *South America*, but before the arrival of that letter, he had entered into a contract to take out several passengers to *New Zealand*, and 70 tons of goods, and part of those goods were then actually laden on board the vessel. It was part of the

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agreement with the owners, that the captain should have two thirds of the profits arising from cabin passengers, and one half of the profit of steerage passengers taken in any of the voyages. After the captain had received this letter of instructions from his owner, he entered into a contract to bring back one of the passengers from *New Zealand* to *New South Wales*. The captain, on the 18th of *July*, notwithstanding the instructions received from his owner, proceeded to *New Zealand*, with the intention to return to *New South Wales*, and then to proceed to the *East Indies*, according to his instructions, and the ship was lost at *New Zealand*. The ship arrived at *New Zealand* on the 4th of *August*. The passengers were landed, and on the 7th the captain weighed anchor with the intention of returning to *New South Wales*, but the ship, in working out of the harbour in *New Zealand*, missed stays, and was lost. *New Zealand* lies in the course of the voyage from *New South Wales* to *South America*, but not in the course of the voyage from *New South Wales* to the *East Indies*. It was insisted at the trial, that the plaintiff was entitled to recover for a loss by barratry. Upon that point the Lord Chief Justice stated to the jury that barratry meant an act of the master in fraud of his duty to his owners. A mere mistake by the captain as to the meaning of the instructions, or a misapprehension of the best mode of acting under the instructions, and carrying them into effect, would not amount to barratry; and he directed the jury to find for the plaintiff, if they were of opinion that the captain acted in fraud of his duty to his owner, when he went to *New Zealand* instead of to the *East Indies*; but if they thought, on the other hand, that he merely mistook the meaning of the instructions, or the best mode of acting for

for the purpose of carrying them into effect, then to find for the defendant. The jury having found for the defendant, the Lord Chief Justice then said, that he was of opinion that the plaintiff was not entitled to recover, inasmuch as at the time of the loss, the ship was not sailing on either of the voyages contemplated by the policy, and he directed a nonsuit, with liberty for the plaintiff to move to enter a verdict. A rule nisi having been obtained for that purpose,

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Marryat, Gurney, and Maule now shewed cause. The ship, at the time of the loss, was not pursuing a voyage protected by the policy. The liberty which it reserves "to trade and sail backwards and forwards, and forwards and backwards," is, indeed, expressed in terms of large and extensive import; but they are not sufficient to comprehend the voyage in question. The liberty is for the said ship "*in that voyage to proceed, &c.*," which shews that the "trading and sailing backwards and forwards, and forwards and backwards," was to be a trading and sailing, either in the voyage from *New South Wales* to *South America*, or in the voyage from *New South Wales* to the *East Indies*, consistent with and subordinate to a predominant intention of proceeding by the ordinary or proper course from *New South Wales* to one or other of those termini. A similar construction has been applied to analogous words, in the cases of *Baker v. Allmutt* (a), *Langhorne v. Allmutt* (b), *Hammond v. Reed* (c), and *Solly v. Whitmore* (d). It may be said, that the ship, at the time of the loss, having been in the proper course for proceeding from *New South*

(a) 15 East, 278.

(b) 4 Taunt. 511.

(c) 4 B. & A. 72.

(d) 5 B. & A. 45.

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STATE

Wales to South America, the intention to deviate from that course by returning to *New South Wales* will not discharge the underwriters, inasmuch as she was lost before that intention was carried into effect. It must be admitted, that an unexecuted intention to deviate will not discharge the underwriter; but with this qualification (which is always to be understood, and is sometimes expressed by the judges who lay down the rule), that the ship, at the time of the loss, must be sailing on the voyage insured. Indeed it is not strictly a deviation or intention of deviating on which the defendant relies, but on the ship having sailed on a different voyage from the voyage insured. It does not follow that she was on that voyage because her course, as far as she pursued it, coincided with the course she would have pursued if she had sailed on it. In order to be on a voyage from *A.* to *B.* it is not sufficient that the vessel should be at *C.*, an intermediate point in the course from *A.* to *B.*: it is necessary, in addition, that the ship should have departed from *A.* with the intention to proceed to *B.* The nature of the risk may be very different before the ship arrives at the dividing point of two different voyages, having a part of their course in common. The risk does not depend on the local situation only of the ship; the state of repair, the crew, stores, &c. proper for one voyage may be very different from those for the other, and many other circumstances influencing the risk may be different in that part of the two voyages which is common to both; and the underwriter who accepts one risk might refuse the other. The case of *Wooldrige v. Boydell* (a) is in point. That was an in-

(a) *Doug.* 16.

surance at and from *Maryland* to *Cadiz*; the ship sailed for *Falmouth*, and the loss took place in the *Chesapeake Bay*, which is in the course of the voyage from *Maryland* to *Cadiz*, as well as to *Falmouth*; but the Court held, that she was not sailing on the voyage insured, and that the underwriters were not liable. Now, in the present case, the ship would be protected on a voyage from *New South Wales* to *South America*, or on a voyage from *New South Wales* to the *East Indies*; but she had not sailed on either of these voyages. There was no intention that she should proceed to *South America*, and she, therefore, was not on that voyage, and she was not in the course of the voyage to the *East Indies*. The voyage on which she sailed was a voyage from *New South Wales* to *New Zealand* and back, and thence to the *East Indies*, and no such voyage is comprehended by the terms of this policy.

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~~against~~
~~Bentley~~

Scarlett, Campbell, and F. Pollock contra. This is a policy on ship couched in very confused and contradictory terms. But, giving it a reasonable construction, it must be held to protect the ship on any intermediate voyage between *South America* and the *East Indies* before the master had determined upon his destination, and had actually proceeded on the voyage for his final destination. The policy is at and from *London* to *New South Wales*, and at and from thence to the *East Indies* or *South America*; and the risk is to continue until the ship shall arrive at her final port or place of destination in the *East Indies* or in *South America*. Then comes the liberty to touch and stay at all ports and places whatsoever. Now if the policy had stopped there, it must be admitted that the vessel would not have been at liberty

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to touch or stay at any port not in the direct line of the voyage. But here the liberty reserved is much larger, for it is to take in and discharge goods and passengers at all ports and places, &c. and for all purposes whatsoever, particularly to trade and sail backwards and forwards, and forwards and backwards. These latter words shew that a trading voyage within the limits described in the policy was in the contemplation of the parties. The word *particularly* seems to have been introduced into the policy in order to give full effect to the intention of the parties, and that word applies to the sailing backwards and forwards, as well as to the trading. The principal object of the policy, therefore, was a trading voyage within the prescribed limits, and consequently the ship was protected whilst she was sailing backwards and forwards within those limits. Now the voyage from *New Zealand* to *New South Wales* was within those limits, and therefore the underwriters are liable. The cases cited on the other side are not in point, for in all of them the liberty was only to touch and stay at any ports and places in the voyage; but in this case the liberty is *particularly* to trade, and to sail backwards and forwards. In *Mellish v. Andrews* (a) the policy was at and from *London* to any and all ports and places in the *Baltic Sea*, forwards and backwards, and backwards and forwards from place to place, and from port to port, and until her safe arrival at her port of final discharge. It was held that the ship after having once touched at a particular port for orders, was not warranted under this policy in going to the same port again; and there it was said by the Court that the

(a) 16 East, 312.

words "backwards and forwards" seemed to intend an inverted course; and that "until her safe arrival at her final port of discharge" meant not where it might be intended that the ship should discharge, but where her last port of discharge should be; *final* being used in contradistinction to elective port of discharge. In the case of *Arnett v. Innis* (a) a similar construction was put upon a policy containing the words "backwards and forwards," but no permission was given by name to trade. The Court, however, held that under the words "to touch and stay at any ports and places whatsoever, and for any purposes whatsoever," it was not a deviation to stay for the purpose of trading. In *Langhorn v. Allnutt* (b) the policy was at and from *London* to any ports and places in the *Baltic*, backwards and forwards. *Gibbs J.* there says the underwriters are as well acquainted with the nature and extent of the risks as the assured. Now what are the risks? To any port or ports, place or places in the *Baltic*. The ship is not bound to select her port before she commences her voyage, it is backwards and forwards, with liberty to touch, and stay, and trade at all ports and places, and for all purposes whatsoever. The permission to stay for any purpose whatsoever must indeed be for some purpose within the scope of the adventure." Now here the taking of goods and passengers to *New Zealand* and back to *Port Jackson* was within the scope of the adventure contemplated by the assured. The final port of destination was left, in some measure, undefined; as soon as the convicts were discharged from the vessel it was the captain's duty to do the best he could for the benefit of

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(a) 4 B. Moore, 150.

(b) 4 Taunt. 518.

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the owner; and with that view he entered into a contract to carry passengers to *New Zealand*, with the intention of returning to *Port Jackson*. Now the policy clearly contemplated a trading voyage; and that being the principal purpose, the taking passengers from *Port Jackson* to *New Zealand* was within the policy.

ABBOTT C. J. I am clearly of opinion that the ship was not within the protection of the policy whilst she was on the voyage from *New South Wales* to *New Zealand*, and back to *New South Wales*. That was clearly the voyage upon which she was sailing at the time when she was lost. The voyage insured, is from *London* to *New South Wales*, and thence to *South America* or the *East Indies*. Supposing the policy had stopped there it could not have been contended that this was a loss within those words. But the policy contains other words, viz. that it should be lawful for the ship, &c. to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, and *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship may proceed to, as well on this as on the other side of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever, and particularly to trade and sail backwards and forwards, and forwards and backwards. These are words, certainly, of very large and extensive import; but, large as they are, they must receive that construction which has been given to similar words in other cases; and, giving them that construction, we must hold, that by this policy the ship would be protected by the policy so long only as she was sailing on an intermedi-

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ate voyage, undertaken with a view to the accomplishment of one or other of the voyages pointed out by the policy as the principal object in contemplation of the parties, viz. a voyage either to *South America* or the *East Indies*. Unless the words of the policy be so construed, there can be no limit, either of time or place, to the risk described in this policy; but construing them in that limited sense which has been put upon similar words in other policies, in order to make this a loss within the terms of this policy, the ship, at the time of the loss, must have been upon a voyage from *New South Wales* to *South America*, or from *New South Wales* to the *East Indies*, or sailing backwards and forwards upon some intermediate voyage, with the view and for the purpose of accomplishing a voyage either to *South America* or to the *East Indies*. In this case, at the time of the loss, the ship was on a distinct voyage, not subordinate to or connected with either of the voyages contemplated by the parties as the principal objects of the contract. That being so, she was not at that time on the voyage insured, and, consequently, the plaintiff is not entitled to recover.

BAYLEY J. This is not a policy for time but for a particular voyage. The rule of construction which has been applied to policies couched in similar terms must also be applied to this. Now, a liberty to touch, stay, and trade at any ports or places whatsoever, has been held to be confined to a staying or trading at any port for a purpose subordinate to the voyage insured, which is the principal object of the policy. I think the liberty to sail backwards and forwards, and forwards and backwards, must be construed so as to protect the ship so long

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long only as she was sailing on a voyage having for its ultimate object the accomplishment of the principal voyage insured, which, in this case, was a voyage either to *South America* or to the *East Indies*. The question then is, whether this ship was upon the voyage insured, at the time when the loss took place. Now, what was the voyage insured? First, from *London* to *New South Wales*. That is one stage. When the ship arrived there, the owner was to have the option of sending her either to *South America* or to the *East Indies*; but he was then to make his option, and the vessel was then to sail either to some port in *South America*, that being the ultimate object, or to some port in the *East Indies*, that being the ultimate object. In order to be within the protection of the policy, the ship must either be on the way to *South America*, *South America* being the ultimate object, or to the *East Indies*, the *East Indies* being the ultimate object of the voyage. But here the vessel sailed on an intermediate voyage to *New Zealand* and back, and although *New Zealand* is in the way from *New South Wales* to *South America*, yet that voyage was commenced without having for its ultimate object the voyage to *South America*, and *New Zealand* was not in the way to the *East Indies*. The ship, therefore, at the time of the loss, was not on a voyage contemplated by the policy, and, therefore, the underwriters are not liable.

HOLROYD and LITLEDALE Js. concurred.

Rule discharged.

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HEWLINS *against* SHIPPAM.

DECLARATION stated, that on the 1st *January* 1820, at, &c. one *W. Humphrey* and one *E. Humphrey* were seised in their demesne as of fee, of and in a certain messuage or inn, and yard thereto adjoining, with the appurtenances, situate at *Chichester*, and being so seised, they the said *W. and E.*, by indenture, did demise the said messuage or inn, and yard, with the appurtenances, to the plaintiff, habendum for a term of years in the indenture mentioned, by virtue of which said demise the plaintiff entered and became possessed for the term, to wit, &c. It then stated, that defendant, to wit, &c. was possessed of a certain other yard, with the appurtenances, situate and being at *Chichester* aforesaid, next to and adjoining the premises of the plaintiff, as tenant thereof, to one *R. Wills*, the reversion belonging to *R. Wills*; and the said *William* and *Edward* being so as aforesaid seised, and the said defendant being so possessed of the said other yard, with the appurtenances, the reversion of and in the

Declaration stated, that one *A.* was seised in fee of a messuage or inn, and yard thereto adjoining, and by indenture demised the same to the plaintiff for a term of years, which was undetermined; that defendant was possessed of a certain other yard next to and adjoining the premises of the plaintiff, as tenant thereof to *A. B.*; and that the defendant and his landlord granted to *A.*, his heirs and assigns, licence and authority to make and construct, at the costs of *A.*, a certain gutter or drain from

and out of the said messuage or inn, into and across, and out of a certain part of the yard of the defendant, unto and into the yard of the plaintiff; and that *A.*, his heirs, and assigns, and his farmers and tenants, occupiers of the messuage and yard, should have the foul water collected in the scullery of the said messuage or inn, to run and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the yard of the defendant, unto and into the yard of the plaintiff, for so long time as need and occasion should require for the convenient occupation of the messuage or its appurtenances. Breach, that defendant, without notice, obstructed the drain. Another count stated the grant to be for so long time as the defendant should be and continue in possession or occupation of the said last-mentioned land, or so long as the same should be requisite for the convenient occupation of the messuage. It appeared in evidence that the licence to construct and continue the drain was by parol: Held, that as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed.

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same belonging to said *R. Wills*, afterwards, &c. the said defendant did give and grant, and the said *Wills* did give, grant, and confirm unto said *William* and *Edward*, their heirs and assigns, licence and authority to make and construct, at the proper costs and charges of said *W. and E.*, a certain gutter or drain from and out of the said messuage or inn, into and upon, over, across, and out of a certain part of the said yard of said defendant, unto and into the said yard of the plaintiff; and that said *W. and E.*, their heirs and assigns, and their farmers and tenants, from time to time and at all times in future, occupiers of the said messuage or inn, and yard, with the said appurtenances, should have the foul water (from time to time collected and being in a certain part, to wit, the scullery of the said messuage or inn,) at all times to drain, run, and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the said yard of the said *James Shippam*, unto and into said yard of plaintiff, for so long time as need and occasion should require, for the convenient occupation of the messuage or inn, with the appurtenances. That said *W. and E.*, confiding in the said licence and authority of said *James Shippam* and said *Wills*, did duly make and construct, at their own proper costs and charges, such gutter or drain as aforesaid, from and out of the said messuage or inn, into and upon, over, across, and out of the said part of the said yard of said defendant, unto and into the yard of the plaintiff, according to the true intent and meaning of the said licence and authority so given, granted, and confirmed; and said *W. and E.* necessarily expended, &c. a large sum of money in and about the making and constructing of the said gutter or drain, of which said premises

premises the defendant had notice. Breach, that the said defendant not having given any notice to the said *W. and E.*, or the plaintiff, or either of them, or made or offered any compensation in that behalf, or countermanded or revoked the said licence and authority, wrongfully and injuriously stopped up the drain. Other counts stated the right to be for so long a time as the defendant should be and continue in the possession or occupation of the last-mentioned yard, or so long as it should be requisite for the convenient occupation of the plaintiff's house; some stated, as part of the consideration, that the defendant's landlord should do some repairs to the defendant's premises. Plea, not guilty. At the trial before *Graham B.*, at the Spring assizes for the county of *Sussex*, 1825, the following appeared to be the facts of the case. The plaintiff was a lessee of the *Swan Inn*, at *Chichester*, under *W. and E. Humphrey*. In May 1819, *W. and E. Humphrey* rebuilt the *Swan Inn*, at *Chichester*, and being desirous to construct a drain in the adjoining premises (in the possession of the defendant) applied to *Wills*, the landlord, who said he had no objection if his tenant had not. The *Humphreys* further agreed to repair the defendant's premises, to raise his chimnies, and to pave his yard. The defendant assented to the making the drain upon these terms, and they raised the defendant's chimnies and paved his yard, and thereby incurred an expence of 100*l.* The drain was constructed, it was paved at the bottom, and covered with solid stone, and the sides were brick. Upon these facts *Graham B.* was of opinion that the right claimed under the licence granted by the defendant and his landlord, to have the drain in the soil of another, was an uncertain interest in the land, within the

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*Hewlett
against
Smitham.*

1886.

Hewlett
v. Schaffan

the first section of the statute of frauds, and not being granted by any instrument in writing, the plaintiff acquired under it a right at will only, which was determined by the defendant's stopping up the drain. He therefore directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. *Taddy* Serjt. in last *Easter* term obtained a rule nisi for that purpose, and cited *Webb v. Paternoster* (a), *Wood v. Lake* (b), and *Godley v. Frith* (c), to shew that the plaintiff acquired no interest in the land where the drain was situate; but a mere easement on the land, viz. the right of having the water run over it. This case was argued at the sittings in banc after last *Michaelmas* term.

Marryat and *Platt* shewed cause. The plaintiff, by virtue of the licence stated in the declaration, acquired an interest in the soil of another, and the licence not being in writing, he had only an estate at will, and that was determined by the defendant's stopping up the drain. The plaintiff acquired the exclusive use of that part of the land on which the drain was constructed. The owner of the inheritance (so long as the right to have the drain continued) was prevented from using the land for any purpose so as to interfere with the right of the plaintiff; he could not build a wall there. He therefore had parted with some interest in the soil which before belonged to him, and whatever that interest was, it had passed to the plaintiff. The latter then contracted for an interest in land; and it is a case, therefore, within the words of the statute, and clearly within the mischief against which the legislature intended to guard.

(a) *Palmer*, 71.(b) *Sayer*, 3.(c) *Yelv.* 159.

As to the cases cited on the other side, *Webb v. Paternoster* (a) was decided before the statute of frauds. *Wood v. Lake* (b) was decided after the statute of frauds, but that case cannot be supported. The plaintiff was to have for seven years the sole use of that part of the land upon which he was to stack his coals; it cannot, therefore, be distinguished from an actual demise for seven years, and that clearly would be within the statute. *Winter v. Brockwell* is not in point, because the defendant put up the skylight on his own land. *Fentiman v. Smith* (c) is directly in point. There the plaintiff declared (in case for obstructing a water-course), upon his possession of a mill with the appurtenances, and that by reason of such his possession he had a right to the use of the water running in a certain tunnel to the mill; it was held that such allegation was not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a certain consideration; but of which no conveyance was made by him to the plaintiff, and he had since refused assent; because the plaintiff had not the water by reason of his possession of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence, was revocable, and revoked; Lord *Ellenborough* there said, the title to have the water flowing in the tunnel over the defendant's land could not pass by parol licence without deed; and the plaintiff could not be entitled to it as stated in the declaration, by reason of his possession of the mill, but he had it by the licence of the defendant,

1826.

HEWLETT
against
SAMPSON.

(a) *Palmer*, 71.(b) *Sayer*, 3.(c) 4 *Rast*, 107.

1926.

NEWLIN
against
SHUTAM.

or by contract with him; and if by licence, it was revocable at any time.

Taddy Serjt. and Long contra. The plaintiff, by virtue of the licence did not acquire any interest in the soil through which the water was to flow, but a mere easement, viz. a right to have his water flow through that part of the soil. It is true, so long as that right continued, the defendant or his landlord could not build so as to obstruct the flowing of the water. Nor can the owner of the soil, subject to a right of way, build upon his land so as to obstruct that right. *Godley v. Frith* (a) is an authority to shew that such a right is an easement only, and not an interest in the land. In *Parker v. Staniland* (b), a contract for the sale of potatoes not dug up was held to give the purchaser no interest in the land, but an easement only, viz. a right to come upon the land for the purpose of taking up and carrying away the potatoes. In *Webb v. Paternoster* (c), it was held, that a grant of a licence to the plaintiff to stack hay upon land for a convenient time till he could sell it, did not amount to a lease of the land, the agreement being for an easement, and not for an interest in the land. In *Wood v. Lake* (d), a liberty to stack coals upon part of a close for seven years, and that during that term the person to whom it was granted was to have the sole use of that part of the close upon which he was to have the liberty of stacking coals, was held to give no interest in the land; and, therefore, notwithstanding the statute of frauds, it was good for seven years. That case was

(a) *Fels*, 159.(b) 11 *East*, 362.(c) *Palmer*, 71.(d) *Sayer*, 3.

cited

cited with approbation by Gibbs C. J. in *Taylor v. Waters* (a). These authorities shew that the plaintiff did not acquire any interest in the soil of the land through which his water was to flow, but whether he acquired an interest in the soil or a mere easement under the licence, *Winter v. Brockwell* (b) is an authority to shew that this licence could not be recalled after it had been executed at the expence of the plaintiff, and *Taylor v. Waters* is an authority to the same effect; and in that case Gibbs C. J. after referring to *Webb v. Paternoster* (c), *Wood v. Lake* (d), and *Winter v. Brockwell* (e), expressly says, "These cases abundantly prove that a licence to enjoy a beneficial privilege on land may be granted without deed, and, notwithstanding the statute of frauds, without writing."

1826.

 HEWLINS.
 against
 SHIPTAM.

Cur. adv. vult.

The judgment of the Court was now delivered by BAYLEY J. This was an application to set aside a nonsuit. The action was for stopping up a drain leading from the plaintiff's premises through the defendant's yard. The ground of the nonsuit was, that the right to have the drain pass through the defendant's yard was an interest in the defendant's land, and under the first section of the statute of frauds, there being nothing in writing to create the right, but its foundation resting in parol only, was a right at will only. The points discussed upon the motion were, whether this was an interest in land or an easement only; and if it were an interest in land, whether the defendant could stop the drain without taking some previous step to determine

(a) 7 Taunt. 584.

(b) 8 East, 308.

(c) Palmer, 71.

(d) Sayer, 5.

(e) 8 East, 308.

1826.

HEWLING
against
SHIFFAN.

the estate at will; but when the state of the pleadings is adverted to, and the nature of the right there claimed considered, it will be clear that a decision upon either of these points is unnecessary, and that if the cause were to go down again to another trial, it must again terminate in a nonsuit. The declaration claimed the right as a licence and authority granted to the plaintiff's landlords, *their heirs and assigns*, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard. One of the counts claimed it indefinitely, without fixing any limits; others restricted it either to the time the defendant should continue possessed of his yard or house, or so long as it should be requisite for the convenient occupation of the plaintiff's house; some stated, as part of the consideration, that defendant's landlords should do some repairs to the defendant's premises; others did not. Now, what is the interest these counts stated? A freehold interest. In *Co. Litt. 42*. it is said: "If a man grant an estate to a woman *dum sola*, &c., or as long as the grantee dwells in such a house, &c., or for any like uncertain time, which time, as *Bracton* saith, is *tempus indeterminatum*, in all these cases, if it be of lands or tenements, the lessee hath, in judgment of law, an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other things that lie in grant, he hath a like estate for life *by the delivery of the deed*, and in count or pleading he shall allege the lease, and conclude that by force thereof he was seised generally for the term of his life." Lord *Hale* (a), in his MS., specifies two or three other instances, but adds, that in pleading, the limitation ought to be pleaded and continuance averred;

(a) See note to *Co. Litt. 42a*.

and *Blackstone*, in his *Commentaries*, vol. ii. p. 121., lays it down, that a general grant, without defining the limits of the estate, passes an estate for life; and *Brewer v. Hill* (a) is an authority to shew that a lease from a vicar, so long as he should continue vicar, passes an estate for life. What, then, was the evidence to make out the grant of an estate for life? It appeared in evidence upon the trial that the drain was made in 1819, at the expence of the *Humphreys*, with the consent of the defendant and Mr. *Wills*, and that the *Humphreys* laid out some money in improving the defendant's premises, but nothing was said as to how long the drain was to continue, nor was any thing in writing between any of the parties; and when the inconveniences such a drain may occasion from smells, and the necessity of cleaning it are considered, it is almost impossible to suppose that *Wills* and the defendant meant to run all risks, and allow the parties an absolute interest so long as the defendant should continue in possession, or so long as it should be requisite, &c. But suppose this had been the intention, can such an interest be created by parol? A right of way or a right of passage for water (where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed. *Terms de la Ley*, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by char-

1826.

HEWLETS
against
SHEPPARD.

(a) 2 *Anstr.* 415.

1836.

HEWLETS
against
SHIPPARD.

ter or prescription, without profit; and it instances, "as a way or sink through his land, or such like." In *Co. Litt. 9 a.*, Lord *Coke* distinguishes between corporeal things which lie in livery, and incorporeal which lie in grant, and cannot pass but by deed, as advowsons, commons, &c., and it seems to be his opinion, that (except in certain specified cases), where livery is necessary as to the one, a deed is necessary as to the other. The same may be collected from the passage already cited from *Co. Litt. 42 a.* In *Co. Litt. 169.*, the excepted case of parceners is mentioned, and there it is said, that though the common of estovers or pasture, or a corody, or a way lie in grant, they may, upon partition *between the parceners*, be granted without deed. So both *Littleton* and Lord *Coke* state, in the same part, that a rent may be granted in the case of parceners for owelty of partition without deed; and Lord *Coke* notices that rents, commons, advowsons, and the like, that lie in grant, though they cannot pass without deed, may be divided between parceners by parol without deed. Chattels, whether real or personal, may in general be granted without deed, *Shepherd's Touchstone*, 282; and in the case of things lying in livery, a demise thereof may be made for any number of years at common law without deed, but Lord *Coke*, in *Co. Litt. 85 a.*, makes a distinction between original chattels and chattels created out of a freehold lying in grant, that the former may pass without deed, the latter cannot be created or pass without it; and whether there is a distinction in this respect between chattel interests created out of freeholds lying in livery and freeholds lying in grant (which I think there is not), it is not necessary to decide, because this is the case of a freehold,

hold, not of a chattel interest. *Shepherd*, in his *Touchst.* 231., lays it down, that licence or liberty (amongst other things) cannot be created and annexed to an estate of inheritance or freehold without deed. In 2 *Roll's Abr.* 62. it is laid down that a thing lying merely in grant cannot pass without deed. In 9 *Co.* 9. it is said, arguendo, that tenant for life cannot *by word without deed* have the privilege of being dispunishable for waste, and that position is adopted in *Shepherd, Touchst.* p. 231. In *Gilbert's Law of Evidence*, p. 96., 6th edition, this is laid down: "If a man shews title to a thing lying in grant, *he fails if the seal be torn off from his deed*, for a man cannot shew a title to a thing lying in solemn agreement, but by solemn agreement; and there can be no solemn agreement without a seal, so that possession alone is not sufficient, since the thing itself does not lie in possession but in agreement; therefore a man cannot claim a title to a watercourse *but by deed, and under seal*. *Bolton v. The Bishop of Carlisle* (a) is at variance with the position laid down by Lord Chief Baron Gilbert, that the party fails *if the seal be torn off the deed*. It was decided in that case, that if the deed be destroyed, other evidence may be given to shew that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in that case. In *Monk v. Butler* (b), where the plaintiff in replevin answered an avowry for damage feasant by a plea of licence from a commoner who had right for twenty beasts, it was objected that if the commoner could licence, he could not do so without deed; and of that opinion was the whole Court. In *Rumsey v. Rawson* (c) the objection to such a licence on

1896.

Hewless
against
Sliffam.
(a) 2 *H. Bl.* 259.(b) *Cro. Jac.* 574.(c) 1 *Vent.* 18—25.

1826.

Howland
against
Brittan.

the account of its not being stated to be by deed, after verdict for the plaintiff on a collateral issue, was overruled, because the licence was only to take the profit *unica vice*, and because no estate passed by it. Yet in a subsequent case of *Hoskins v. Robins* (a) a similar objection was overruled, not on the ground that a parol licence would be sufficient, but on the ground that the objection to the mode of pleading the licence was waived by an issue on a collateral point, and that after verdict on such issue it must be taken that the licence was by deed; but, according to the report in *Saunders, Hale C. J.* and the Court, seemed to be of opinion that the licence could not be granted without deed. In *Harrison v. Parker* (b), where liberty and licence, power and authority were granted to the plaintiff and his heirs to build a bridge across a river, from plaintiff's close to a close of Sir George Warren, and liberty and licence to plaintiff to lay the foundations of one end on Sir G.'s close, the grant was by deed. And in *Fentiman v. Smith* (c), where the plaintiff claimed to have passage for water by a tannel over defendant's land, Lord *Ellenborough* lays it down distinctly: "The title to have the water flowing in the tunnel over defendant's land could not pass by parol licence without deed." Upon these authorities we are of opinion, that although a parol licence might be an excuse for a trespass till such licence were countermanded, that a right and title to have passage for the water, for a freehold interest, required a deed to create it, and that, as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported. The case of *Winter v. Brockwell* (d), which was relied

(a) 2 *Fent.* 123—163. 2 *Saund.* 327.(b) 6 *East*, 154.(c) 4 *East*, 107.(d) 8 *East*, 309.

upon

upon on the part of the plaintiff, appears clearly distinguishable from the present. All that the defendant there did, he did *upon his own land*. He claimed no right or easement upon the plaintiff's. The plaintiff claimed a right and easement against him, viz. the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was, that as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to incur expence in making such obstruction, he could not retract that consent without reimbursing the defendant that expence. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his ownland in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb v. Paternoster* (a), *Wood v. Lake* (b), and *Taylor v. Waters* (c) were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. These, therefore, cannot be considered as authorities upon the point; and on these grounds, therefore, that the right claimed by the declaration is a freehold right, and that if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed; we are of opinion that the nonsuit was right, and that the rule ought to be discharged.

Rule discharged.

(a) *Palm.* 71.

(b) *Sayer*, 3.

(c) 1 *Tunst.* 374.

1826.

HEWLINS
against
SHIPPAM.

1826.

Munday,
February 6th.

GEARY *against* PHYSIC.

An indorsement upon a promissory note written with a pencil, is a valid indorsement within the custom of merchants.

ASSUMPSIT by the plaintiff as indorsee against the defendant as maker of a promissory note for the sum of 80*l.* payable two months after date to the order of one *Folger*, and indorsed by him, *Folger*, to one *Kemp*, who subsequently indorsed the note to the plaintiff. At the trial before *Abbott C. J.* at the *London* sittings after *Hilary* term, 1825, it appeared that the indorsement by *Kemp* to the plaintiff was in pencil, and it was thereupon objected that the plaintiff could not recover; an indorsement in pencil not being such an indorsement as the law and custom of merchants recognizes to be sufficient to pass the interest in a bill of exchange, and promissory notes being by the statute 3 & 4 *Ann. c. 9. s. 1.* assignable or indorsable in the same manner as unpaid bills of exchange are according to the custom of merchants. The Lord Chief Justice thought it sufficient, and directed the jury to find a verdict for the plaintiff, reserving liberty to the defendant's counsel to move to enter a nonsuit, if the Court should be of opinion that the indorsement of the promissory note in pencil was not a good and valid indorsement. *F. Pollock*, in last *Easter* term, obtained a rule nisi to enter a nonsuit. He contended, first, that a writing in pencil was not a writing recognized at common law; and he cited *Co. Lit.*, 229 *a.*, where Lord *Coke*, speaking of a deed, says, "Here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen,

or

or on the bark of a tree, or on a stone, or the like, &c., and the same be sealed or delivered, yet is it no deed, for a deed must be written, either in parchment, or paper, as before is said, for the writing upon these is least subject to alteration or corruption." For the same reasons a writing ought to be made with materials least subject to alteration or corruption. Now, writing made with a pencil is easily altered or obliterated, and, therefore, for the reasons given by Lord *Coke*, where the law requires a contract to be in writing, it ought to be in writing made with materials the least subject to alteration. Secondly, he contended, that it was not a writing according to the custom and usage of merchants. In point of practice bills of exchange were generally written in ink, and it lay upon the plaintiff in this case to shew by evidence that this was a writing according to the custom of merchants.

1626.

 GRANT
 against
 PRYNG.

Thesiger now shewed cause. The passage cited from *Co. Litt.* 229 *a.* regards only the materials upon which, not with which, a deed must be written; and even assuming that a deed written in pencil might not be good, it does not, therefore, follow that a bill of exchange so written may not be so. Deeds are more solemn instruments, and are intended permanently to go along with the inheritance, but bills of exchange are made to continue in force for a very short period. Letters and words traced on paper by a pencil, constitute writing in the ordinary acceptation of that term. In *Jeffrey v. Walton* (a) a memorandum entered in pencil upon a card was

(a) 1 Stark. 267.

1826.

Quarry
against
Payson.

received as evidence of an agreement ; and in *Rymes v. Clarkson* (a), Sir John Nicholl was of opinion that a will written by a testator with a pencil would be valid, provided that the Court could be satisfied that he intended so to execute his will. In *Green v. Skipworth* (b) a disposition made by a testator in pencil was carried into effect, and in *Dickenson v. Dickenson* (c) alterations in pencil on a regularly executed will were admitted to probate. Sir John Nicholl said " there was no doubt that in point of law they must be considered as equally valid as if made in ink, provided the deceased intended them to take effect." Now, there can be no question as to the intention here. For here *Kemp* not only wrote his name on the note in pencil, but he passed it from his hand to another, thereby clearly shewing that he intended to transfer the property in the note. The authorities, therefore, shew that this indorsement in pencil is an indorsement in writing within the legal meaning of that term. Secondly, it is an indorsement in writing within the usage and custom of merchants. That usage requires that the indorsement should be in writing ; it refers to the act to be done, and not to the particular mode or the materials with which it is to be done. The argument addressed to the Court on the part of the defendant goes to confound the usage with the practice. If the usage requires not only that the indorsement should be in writing, but that it should be written in a particular mode, it will be a matter of enquiry whether the colour of the ink, or the species of paper on which the bill is written, be such as is required by the custom.

(a) 1 Phill. 92.

(b) 1 Phill. 55.

(c) 2 Phill. 173.

F. Pollock

F. Pollock contra. The passage from *Co. Litt.* was cited to shew that where the law required a contract to be in writing, it required that it should be written on materials which were the least subject to alteration; and from thence it was inferred that the law, for the same reason, would require that it should be written with materials having the same quality, general convenience certainly requiring that negotiable instruments should be written with materials more durable than pencil. It lay upon the plaintiff to shew that such a writing was a writing within the custom of merchants, and that he has not done. Suppose the indorsement on the paper had been scratched with a pin, or with the inverted end of a pencil, would that have been a writing according to the custom of merchants?

1826.

 GEARY
 against
 PHILLIPS

ABBOTT C. J. There is no authority for saying that where the law requires a contract to be in writing, that writing must be in ink. The passage cited from Lord *Coke* shews that a deed must be written on paper or parchment, but it does not shew that it must be written in ink. That being so, I am of opinion that an indorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent its being generally adopted. There being no authority to shew that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an indorsement

of

1885.**GRANT
against
PAYNE.**

of bills of exchange should be in writing (a), without specifying the manner with which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff.

BAYLEY J. I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials.

HOLROYD J. concurred.

Rule discharged.

(a) See the custom stated in *Lutwidge*, 878.

1826.

REX *against* BRODERIP, Esq.Monday,
February 6th.

W. KIDNER was convicted in the penalty of 5*l*. before two of the overseers and rulers of the society or company of watermen, wherry-men, and lightermen, using, occupying, or exercising any rowing upon the river *Thames* between *Gravesend* in the county of *Kent*, and *Windsor* in the county of *Berks*, on the complaint of *Thomas Neal*, a waterman and wherryman rowing and working boats upon the river *Thames* between the limits aforesaid, and a freeman of the aforesaid society or company, for working a boat for hire and gain on the river *Thames*, at *Richmond*, in the county of *Surrey*, between the limits aforesaid, and receiving, taking, and carrying in the said boat more than eight passengers at one and the same time. The penalty not having been paid, an application was made to the defendant, a justice of peace, to issue his warrant against *Kidner*, but he refused, on the ground that the complainant had not been examined on oath. It appeared now to be a matter of doubt upon the construction of the statute, whether it were or were not necessary that the complainant should be examined upon oath. The 10 G. 2. c. 31. s. 8. subjects any waterman carrying any more than a limited number of passengers in his boat, on being convicted *by the oath* of one or more credible witness or witnesses, or by the confession of the party or parties before the Lord Mayor of the city of *London*, or one or more justices of the peace, to a penalty. The 34 G. 3. c. 65. s. 5. which gives a general mode of proceeding for the recovery of penalties inflicted by the laws relating to watermen on the river *Thames*,

Whether a conviction of a waterman for carrying in his boat, upon the river *Thames*, more persons than are allowed by law, must be founded upon testimony given upon oath, *quære*.

That point being doubtful, the Court refused a mandamus to compel a magistrate to enforce the conviction.

1826.

The King
against
Bosman.

Thames, before the Lord Mayor and justices of the peace, requires *them* to examine *upon oath* the complainant or any witness or witnesses. The ninth section of that statute gives jurisdiction to the overseers and rulers of the watermen's company in cases arising between waterman and waterman, to hear and determine concerning any such offence, and convict the offender; and enacts, "that it shall be lawful for them to summon the party accused, and he, being before them, to hear and examine the complainant, or any witness or witnesses touching such offence, and to determine concerning the same." It then enables them to impose a fine, and in case of non-payment of the same, that *it shall be lawful* for the mayor or justices, upon production of such conviction, to issue his or their warrant for apprehending the offender, and to commit him to prison unless such penalty be paid. The twelfth section enacts, that in every case in which any oath is by that act directed to be taken, the mayor and justices respectively before whom such oath is directed to be taken, shall have full power to administer the same. A rule nisi for a mandamus had been obtained, on the ground that the statute was imperative on the magistrate to issue his warrant on proof of the conviction and non-payment of the penalty.

The *Attorney General* and *Maule* were now heard against the rule, and *Bolland* contra.

Per Curiam. It is not clear that it was the duty of the justice to issue his warrant in this case. The words of the ninth section are, "that it shall be lawful for the mayor or justices to issue the warrant;" not that they are *required* so to do. Besides, it is at least doubtful whether

whether the conviction, not having taken place upon examination on oath, was legal: and this Court will not compel a magistrate to do that which may subject him to an action of trespass.

1826.

The KING
against
Baonsair.

Rule discharged.

The KING *against* The Justices of SURREY.

Tuesday,
February 7th.

AN order was made by justices at special sessions, for diverting and turning a certain part of a public footway called *The Bishop's Walk*, in the parish of *Lambeth*, in the county of *Surrey*. The notice of holding the special sessions was served on the several magistrates of the division by the clerk of the magistrates and not by the high constable. There was no appeal against the order. The court of quarter sessions were of opinion that the special sessions had not been duly convened, inasmuch as the notice of holding the sessions ought to have been served by the high constable, and refused to confirm the order. A rule nisi having been obtained for a mandamus, commanding the justices to confirm the order,

The notices of holding a special sessions for the purpose of diverting a public highway, must be given to the justices of the peace of the county acting within the district, by the high constable of the hundred.

Nolan and *Barnewall* now shewed cause. By statute 55 G. 3. c. 68. s. 2. justices may by an order made at some special sessions, divert and turn highways, bridleways, or footways. In *Rex v. The Justices of Worcestershire* (a) it was held that the special sessions must be convened in the manner pointed out by the 13 G. 3. c. 78. s. 62. which enacts "that it shall be lawful for any two

(a) 2 B. & A. 228.

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justices

1826.
 ———
 The King
 against
 The Justices of
 the Peace.

justices of the peace within their respective limits to hold any special sessions for executing the purposes of that act, and to adjourn the same from time to time as they shall think fit, causing notice to be given of the time and place of holding such special sessions, and of the adjournments thereof, to the several justices acting and residing within such limits *by the high constable, or other proper officer within the same.*" The latter words "*other proper officer,*" must mean officer ejusdem generis with the high constable. The latter is an officer known to the law, having certain public duties to perform, for the neglect of which he is liable to punishment. The clerk to the magistrates of the division is not an officer recognized by the law; he may be dismissed from his office, but he cannot be punished for not obeying the orders of the magistrate. The terms "*other proper officer,*" apply to any officer of a town corporate analogous to a high constable in a hundred, for this statute gives the same power to justices in corporations as to justices of counties.

Scarlett and *Thesiger* contra. That part of the clause which enacts that the magistrates shall cause notice to be given to the justices by the high constable or other proper officer, is merely directory. The object of the legislature was that the justices should have notice, in order that they might consider the propriety of making the order. If this object be attained, it is immaterial by whom the notices are given. In ordinary cases the high constable rarely serves the notices personally, but deposes some person to execute that duty for him. And if notices served by such a deputy are sufficient, much more ought they to be considered so when they are given

given by the clerk to the magistrates, whose functions are probably known to them all, and who being clothed with an official character, may be fairly regarded as a proper officer within the intention of the act. The case of *Rea v. The Justices of Worcestershire* (a) rather fortifies this view of the question, for it seems to regard as the primary object of the legislature that reasonable notice in point of time of holding a special sessions should be given, and that if the magistrates in that case had received such notice, the order would have been good. The act is imperative so far as it requires the justices to cause notice to be given; it is directory only so far as the mode of giving the notices is considered. This is the more reasonable construction of the act, especially when it is considered that the subsequent statute 55 G. 3. c. 68. requires notices of the intention of stopping up or diverting the way to be given, not only to the justices, but to all other persons residing in the neighbourhood.

1826.

—
The King
against
The Justices of
Somerset.

ABBOTT C. J. By the stat. 13 G. 3. c. 78. s. 62. justices in corporations, as well as justices in counties, have power to act within the limits of their respective jurisdictions. I think the words, *other proper officer*, mean an officer of a corporation analogous to a high constable in a hundred; and if that be the meaning of those words, then it is very clear, that in a county the high constable of the hundred is the proper officer to give the notices; and as the notices in this case were not given by the high constable, I think that the special sessions were not duly convened, and consequently the court of quar-

(a) 2 B. & A. 228.

1826.

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The King
against
The Justices of
Surrey,

ter sessions were right in refusing to confirm the order. The enactment, as to the mode of convening the special sessions, is not to be considered a mere matter of form. It is obvious that the legislature intended that all the justices acting within the district should have an opportunity of being present to consider the propriety of making the order. That object will be best attained by having the notices of holding the sessions served upon the different magistrates by that officer, whose duty it is to execute the orders of the magistrates, and who is liable to punishment if he neglects his duty. The clerk to the magistrates might be dismissed from his office if he neglected to obey the orders of the magistrates, but I am by no means prepared to say that he would therefore be liable to punishment. Upon the whole, I am of opinion that notice of the time and place of holding the special sessions ought to have been given by the high constable, and that not having been done in this instance, the proceedings were irregular. The sessions, therefore, were right in refusing to confirm the order, and the rule for a mandamus must be discharged.

Rule discharged.

Tuesday,
February 7th.

BROOKHOUSE *against* The Sheriff of DERBYSHIRE.

Sheriff arrested
A. B. on the
13th *November*
upon a writ
returnable the
15th, and suf-

ON the 13th of *November* the defendant arrested *A. B.* at the suit of the plaintiff, under a writ returnable on the 15th, and suffered him to go at large without giving him to go at large without giving a bail-bond, and afterwards returned *cepi corpus*. Bail above were put in on the 17th of *December*, and on the same day *A. B.* was rendered, but notice of render was not given until the 13th of *January*. An action against the sheriff for the escape was commenced on the 19th of *December*. The Court stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion,

taking

taking a bail-bond. On the 17th of *November* the sheriff was ruled to return the writ, and returned cepi corpus, the party at that time being at large. No rule to bring in the body was ever served. On the 17th of *December* special bail were put in, and the defendant was rendered, but notice of the render was not given until the 13th of *January*. An action for the escape was commenced against the sheriff on the 19th of *December*, and a rule having been obtained for staying the proceedings in that action,

1826.

BROOKHOUSE
against
The Sheriff of
DERBYSHIRE.

George shewed cause, and contended, that as the action was commenced before any notice of render was given, the proceedings could not be stayed, and he relied upon the decision of the Court of C. P. in *Burn v. The Sheriff of Middlesex (a)*.

N. R. Clarke, contra, contended, that as the render was actually made before the commencement of the action for the escape, and no trial had been lost in the original action, the rule ought to be made absolute; and he cited *Pariente v. Plumbtree (b)*, and *Allingham v. Flower (c)*.

Per Curiam. Under the circumstances of this case, we think that the rule must be made absolute, upon payment of costs up to the time when notice of render was given, and the costs of this motion.

Rule absolute.

(a) 2 Marsh. 261.

(b) 2 B. & P. 35.

(c) *Ibid.* 246.

1826.

Wednesday,
February 8th.

The KING against STEVENS.

Indictment for perjury alleged that on the trial of an indictment against *J. H.*, defendant, intending to injure *J. H.*, and to cause him to be wrongfully convicted, appeared as a witness, and was sworn, &c., "and then and there falsely and maliciously gave false testimony against *J. H.*, by falsely deposing," &c., and so the jurors say that defendant committed wilful and corrupt perjury: Held, in arrest of judgment, that this count was bad, for not alleging that defendant wilfully or corruptly swore falsely.

Another count alleged, that at the trial of *J. H.* he was found guilty, "by means of the false and material testimony of defendant in

the first count mentioned;" that a rule nisi for a new trial was granted, and that defendant knowingly, falsely, wilfully, and corruptly made affidavit that the evidence given by him at the trial of *J. H.* was true, "whereas it was false in the particulars in the first count assigned and set forth:" Held, that this count also was bad; for that it should have averred distinctly that defendant was sworn as a witness, and deposed to certain facts at the trial of *J. H.* instead of leaving it to be taken by intendment.

INDICTMENT for perjury. The first count stated, that on, &c., *J. H.* was in due form of law tried upon a certain indictment then depending against him in the court of King's Bench; that the defendant wickedly devising and intending to injure and aggrieve the said *J. H.*, and to cause him to be wrongfully convicted, did, at the trial of the said indictment, appear as a witness, and was then and there sworn, &c., and then and there *falsely and maliciously gave false testimony* against the said *J. H.* in support of the said matters charged against the said *J. H.* in the said indictment, by then and there deposing and giving in evidence, &c., (the evidence was then set out, materiality averred, and perjury assigned upon each part of it.) And so the jurors say that *J. S.* did, in manner and form aforesaid, commit wilful and corrupt perjury. The fifth count (the only one that differed materially from the first) stated, that at the trial of the said indictment, the said *J. H.*, by means of the false and material testimony of the said *J. S.*, in the said first count of this inquisition mentioned, was unlawfully and untruly found guilty. That a rule nisi for a new trial was granted, and thereupon *J. S.*, minding and wickedly imagining, devising, and intending, by falsehood and wicked means, to prevent and hinder the said rule from being made absolute,

and

and to prevent justice, &c., came before *W. E. W. T.*, a commissioner, &c., and was then and there duly sworn, (*W. E. W. T.* having full power to administer an oath in that behalf) and being so sworn, knowingly, falsely, wickedly, wilfully, and corruptly did, then and there, before, &c., depose, swear, and make affidavit in writing, in substance that the evidence which he *J. S.* had given on the said trial was true. Whereas, in truth and in fact, the evidence which the said *J. S.* had given on the said trial was not true, but was false in the particulars in the said first count of this inquisition assigned and set forth, and which said particulars were then and there material in respect of the said indictment, and of the said rule, &c. Plea, not guilty. At the trial before *Burrough J.* at the Spring assizes, 1825, for the county of *Cornwall*, the defendant was found guilty, and in *Easter* term a rule was obtained for arresting the judgment, against which

1826,

The King
against
SEVERNS,

Wilde Serjt. and *Manning* shewed cause. Taking the whole of the first count of this indictment together, the fair construction of it is that the defendant is charged with having knowingly given false testimony on the trial of *Halse*. The rule was obtained on the authority of *Rex v. Greepe* (a), and *Rex v. Harris* (b). But the objection to the indictment in the former was, that the witness was alleged to have sworn that *A. B.* was at *Newnham*, innuendo *Newnham* in *Devon*; that *Newnham*, without more, was too vague, and that an innuendo could not make it good, and upon that ground the judgment was arrested: but that judgment was

(a) 2 Salk. 513.

(b) 5 B. & A. 926.

1826.

The King
against
STEVENS.

afterwards reversed in the House of Lords (a). The indictment in *Rex v. Harris* set out two contradictory statements, made on oath by the defendant, and concluded "and so the defendant committed wilful and corrupt perjury," without saying which statement was true, and which false. The indictment was held bad on the ground that it was in the alternative, and that a conviction upon it could not be pleaded to a subsequent prosecution for the same offence. It is not, therefore, an authority for this case. The cases mentioned in 3 *Inst.* 167. turned upon the particular words of the statute 5 *Eliz. c.9.*, in which the words "wilful and corrupt," are used to define the offence contemplated by the statute. *Cox's* case (b) shews that the word *wilful* is not necessary in an indictment for perjury at common law. In this indictment it is alleged that the defendant "*maliciously* swore falsely, intending to cause *Halse* to be wrongfully convicted," that is, equivalent to stating that he corruptly swore falsely. [*Holroyd J.* Must you not add the epithets constituting the gist of the offence to the description of the offence itself, and not the intention?] In 3 *Inst.* 164. Lord *Coke* defines perjury in these words: "Perjury is a crime committed when a lawful oath is administered, by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and *falsely* in a matter material to the issue or cause in question, by their own act, or by the subornation of others." There, *falsely* seems to be used in the same sense as in attain for false verdict, and there the writ directs jurors to be summoned to enquire whether the former jury have made a *false* oath. (c) It is

(a) 1 *Ld. Raym.* 256.(b) 1 *Leach*, 71.(c) *Fitz. N. B.* 105.

difficult

difficult to understand, then, why the allegation in an indictment for perjury at common law, that a witness maliciously swore falsely, should not be sufficient. At all events this objection cannot be urged against the last count, but it will be contended that the reference to the first count is too vague. But this last count states that the defendant wilfully and corruptly made a false affidavit that his evidence given on the trial of *Halse* was true; and then, instead of enumerating the particulars in which that evidence was false, it refers to the assignments of perjury in the first count. Had those assignments been repeated in the last count, it would clearly have sufficed, but by the reference they are virtually incorporated in it.

1826.

The King
against
Smythe.

C. F. Williams, Bayley, and Carter contra, were desired by the Court to confine their observations to the last count. If the first count is bad on the grounds which have been argued on the other side, the last count must be also bad. It contains no assignment of perjury, save that in the first count, and if perjury is not well assigned in that count, it cannot be any better in the last. Again, the last count does not set out any particular evidence given by the defendant, it does not even contain any direct allegation that the defendant gave evidence on *Halse's* trial, with reference to which the affidavit is stated to have been afterwards made.

ABBOTT C. J. I am of opinion that this rule must be made absolute. As to the first class of counts the objection is, that they do not charge that the defendant swore *wilfully* or *corruptly*. Every definition of perjury is swearing wilfully and corruptly that which is false.

Whether

1836.

**The King
against
Surrey.**

Whether the word *maliciously* might supply the place of either *witfully* or *corruptly*, it is not necessary to determine, for neither of those words is found in the counts in question, and *Cox's* case, which has been referred to, proves, at all events, that such counts are insufficient. I now come to the consideration of the last count. It is in a form perfectly novel. It was intended to allege perjury in an affidavit made in this Court. In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false, and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But the fact of his having been sworn must be taken by intendment. Were we to do that, as we are desired to do, in support of this indictment, we should furnish a precedent for a very loose and insufficient mode of charging a very serious offence, which has always hitherto been required to be charged with great certainty and particularity. I think that these novel attempts in pleading are not to be encouraged, and that the judgment must be arrested.

The rest of the Court concurring,

Rule absolute.

1826.

Ex parte PAIN.

Thursday,
February 9th.

PLATT moved for a writ of habeas corpus to bring up the body of *Pain*, in order to have him discharged. The prisoner had been convicted under the 6 G. 4. c. 108. s. 3. The conviction stated, that an information was exhibited against *Pain*, which charged that he was on, &c. discovered to have been on board a certain boat on the high seas, then liable to forfeiture under the provisions of a certain act of parliament relating to the revenue of customs (a). "For that the boat

By the 6 G. 4. c. 108. s. 3. it was enacted, that vessels of a certain description found "in any part of the *British or Irish Channels*, or elsewhere on the high seas, within 100 leagues of the coasts of the United Kingdom," having

"in any manner attached thereto" casks of certain dimensions, "of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits, (unless such casks are really necessary for the use of such vessel, or are a part of her cargo, and included in the regular official documents of such vessel,)" the casks, vessel, &c. shall be forfeited. By s. 49., certain persons found to have been on board such vessels liable to forfeiture, are subjected to certain punishments. A conviction stated that *A. B.* was convicted of having been found on board a vessel liable to forfeiture; "for that it was found in the *British Channel*, having in a certain manner attached thereto divers, to wit, twenty casks (of the dimensions mentioned in s. 3.), and of the sort or description used, or intended to be used, for the smuggling of spirits, the said casks not being really necessary for the use of the vessel, and included in the regular official documents of the vessel." Held, first, that the vessel being found in the *British Channel*, it was not necessary to allege that she was within 100 leagues of the coast. Secondly, that the statement that the casks were "in a certain manner" attached to the vessel was sufficient. Thirdly, that it was not necessary to negative that the casks were part of the cargo, the conviction stating that they were not included in the official documents of the vessel. Fourthly, that the allegation that the casks were "of the sort or description used, or intended to be used, for the smuggling of spirits," being in the alternative, was bad.

not

(a) By the 6 G. 4. c. 108. s. 3. it is enacted, "That if any vessel or boat, not being square-rigged, belonging in the whole or in part to his majesty's subjects, or whereof one half of the persons on board, or discovered to have been on board the said vessel or boat, shall be subjects of his majesty, shall be found in any part of the *British or Irish Channels*, or elsewhere on the high seas, within 100 leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board, or in any manner attached or affixed thereto, or conveying or having conveyed in any manner any brandy, &c., or any cordage, &c., or any casks or other vessels whatsoever capable of containing

1826.

Ex parte
PAIK.

not being square-rigged, and belonging in the whole to his said majesty's subjects, on, &c., was discovered to have been in a certain part of the *British Channel*, having in a certain manner attached to the said boat divers, to wit, twenty casks, capable of containing liquids, of less size and content than forty gallons each, and of the sort and description *used or intended to be used* for the smuggling of spirits, the said casks not being really necessary for the use of the said boat, and included in the official document of such boat, contrary to the form of the statute. The said *H. Pain* being discovered to have been on board the said boat at the time of her becoming and being so subject and liable to forfeiture, &c." The warrant of commitment followed the conviction. Four objections were taken to the conviction; first, that the offence was described in the alternative, viz., that the boat, on board which the prisoner had been, was discovered to have been in a certain part of the *British Channel*, having in a certain manner attached to her twenty casks, *used or intended to be used* for smuggling. Secondly, that the mode in which the casks were attached to the boat should have been alleged with more certainty. Thirdly, that the conviction did not state that the boat had been within 100 leagues of the coast of the United Kingdom. Fourthly, that the exception in the statute was not sufficiently negatived, the

containing liquids of less size or content than forty gallons, of the sort or description *used or intended to be used, or fit or adapted for the smuggling of spirits, &c.*, (unless such cordage or other articles as aforesaid are really necessary for the use of the said vessel, or are a part of the cargo of the said vessel, and included in the regular official documents of the said vessel,) then, and in such case, the said spirits, &c., together with the casks, &c., and also the vessel, &c., shall be forfeited."

con-

conviction merely stating that the casks were not necessary for the use of the boat, and were not included in the official documents of the boat. [*Abbott C. J.* The first is the only objection in which there is any weight. The statute speaks of casks *in any manner* attached to the boat; the manner of attaching them forms no part of the offence. As to the third; if the boat be found any where in the *British or Irish Channels*, no question as to the distance from the coast can arise. The fourth objection fails, because the exception does not apply, unless the casks are both part of the cargo and included in the official documents of the boat. Here it is alleged that they were not so included, they could not, therefore, be within the exception.]

1826.

Ex parte
Parr.

The Attorney-General and *Shepherd* opposed the motion, and contended that the first objection was also invalid; for, that whether the casks were of a description used in smuggling, or intended to be so used, they were equally within the words of the statute; and that consequently the description in the alternative was sufficient; and they relied upon the case of *Rex v. Middlehurst (a)*, where an order of sessions confirming an order of two justices made in pursuance of the 11 G. 2. c. 19. s. 3. against *T. Middlehurst*, for “wilfully and knowingly aiding and assisting in fraudulently removing and conveying away five cows, &c., or in concealing the same,” was held good. So also in *Hale’s P. C. 535*. it is said, that an indictment for robbing in or near the king’s highway is good.

(a) 1 Burr. 599.

Per

1826:

Ex parte
Pain.

Per Curiam. In *Rex v. Middlehurst*, the Court appear to have proceeded upon a distinction between an order and an indictment; and it has always been held that matters of form must be as strictly observed in summary convictions as in indictments. In the passage cited from *Hale's P. C.* it is said that the indictment is good in the form there mentioned, because that which is in the alternative is not the substance of the offence. The enactment in question mentions three descriptions of casks which it is unlawful to have attached to any boat under certain circumstances. First, those of the sort or description used for the smuggling of spirits; secondly, those intended to be so used; and, thirdly, those fit or adapted for that purpose. This conviction does not allege that the casks attached to the boat on board which the prisoner was found, answered any one of those descriptions, but that they answered one or other of those descriptions. That allegation in the alternative is defective in form, and the prisoner is entitled to avail himself of the mistake. The writ must, therefore, be granted.

Writ granted.

Friday,
February 10th.

The KING against TREMEARNE.

Where, on the trial of an indictment for perjury, it being necessary to swear talesmen from the common jury panel to serve on the jury, and one *J. Williams* being called, his son, *R. H. Williams*, (at the request of his father, and without collusion with the prosecutor or defendant,) appeared for him, and was sworn and served on the jury, he not being of age, nor having a qualification by estate, nor being on any panel: Held, that there was a mistrial, and that a rule obtained for a new trial must be made absolute.

full

full special jury did not appear, and it became necessary to swear talesmen. One *J. Williams*, on the common jury panel, being called, his son, *R. H. Williams*, appeared and was sworn, and served on the jury. *R. H. Williams* was not on the panel, was under age, and had not any qualification. He appeared, and served for his father at his request, and without the knowledge or connivance of the prosecutor or defendant. The jury, having found the defendant guilty, he obtained a rule nisi for a new trial, upon affidavits setting forth the facts above mentioned.

1836.

—
The King
against
Thomason.

Manning and *Hill* shewed cause. It is not a sufficient ground for a new trial that a wrong person answered as one of the jury and was sworn, *Hill v. Yates* (a), *Wray v. Thorn* (b). In *Dovey v. Hobson* (c), a new trial was granted because the objection was made before verdict. The want of qualification is a ground of challenge, *Cq. Lit.* 156 b., and cannot, therefore, be urged in this stage of the proceedings. It is also there laid down, that infancy is a cause of challenge, and in § H. 6. pl. 16. it appears that one of twelve compurgators in a wager of law was challenged for infancy, which case is cited in *Bro. Abr. tit. Coverture and Infancy*, pl. 22. In *Lit. s.* 259. and the *Commentary*, 172 b., it is said, that an infant shall not be sworn in an inquest, quod minor jurare non potest; but that certainly is not law now as to swearing infants as witnesses.

C. F. Williams and *Bayly* contra. The law has prescribed certain qualifications as necessary for persons

(a) 12 East, 229.

(b) *Willes*, 482.

(c) 2 Marsh. 154.

serving

1826:

—
The King
against
Thomson.

serving on juries. They must be of full age, and possessed of certain property. One of the jurors who tried this case had not either of those qualifications. The objection to him is therefore very different from that which was taken in *Hill v. Yates*, and the case from *Newcastle* then cited by Lord *Ellenborough*, in neither of which did it appear that the party who served was disqualified. Besides, by the 7 & 8 W. 3. c. 32. s. 3. no person can serve as a talesman who is not returned upon some other panel; the person objected to in this case was not upon any other panel. For these reasons there was a mistrial

ABBOTT C. J. I am of opinion that we ought to grant a new trial. It appears that in *Hill v. Yates*, and in *Wray v. Thorne*, the Court did not think it necessary to yield to an application of this nature. But in the present case, the person who appeared in the name of his father, and served on the jury, was not qualified by estate so to do, and had not arrived at that age which the law considers necessary to give competent knowledge to sit in judgment. I do not see how a challenge could be taken. Had the party been on the panel, perhaps the objection should have been made a ground of challenge, and in order to be properly sworn as a talesman he ought to have been on some other panel. I am quite aware of the difficulty pointed out by Lord *Ellenborough* in *Hill v. Yates*, viz. that yielding to such an objection lays open a door to practice and collusion. It is necessary to guard against that as well as we can, but I think we should not be justified by the apprehension of mischief which may hereafter arise, in saying that a verdict shall be

be binding where a person, without practice of either party, has appeared and served on the jury, not having the requisite qualification, either of age or estate. Looking at these particular circumstances in this case, I think that we ought, in a sound exercise of our discretion, to make the rule for a new trial absolute.

1826.

The King
against
TREMBLETT.

BAYLEY J. It appears by the cases *Fermor v. Dorington* (a), *Hasset v. Payne* (b), and *Roe v. Devys* (c), that where one person is named in the panel, and another in the distringas, and the latter serves on the jury, it is a mis-trial, because none should serve save those in the panel.

HOLROYD J. This defendant, without any fault on his part, was tried by a person, who by law was not competent to serve on the jury, and as that has been made apparent to the Court, we ought not to proceed to give judgment upon a verdict so found.

LITTLEDALE J. This person was not competent to serve on the jury, but as he was not in the panel, no challenge could be taken. The Court are, therefore, bound to act upon the affidavits laid before them, and I think they disclose sufficient grounds for a new trial.

Rule absolute.

(a) *Cro. Eliz.* 222.(b) *Ib.* 256.(c) *Cro. Car.* 563.

1826.

METCALF *against* BOWES.

Warrant of attorney and judgment for securing an annuity set aside, because the initials only of the Christian names of the witnesses were inserted in the memorial.

A RULE nisi had been obtained for setting aside the warrant of attorney given in this cause for securing an annuity, and the judgment signed thereon, on the ground that only the *initials* of the Christian names of the witnesses to the execution of the warrant of attorney by the defendant were stated in the memorial.

Scarlett and *Tindal* shewed cause, and contended that it was not imperative on the Court to set aside the warrant of attorney.

ABBOTT C. J. We have no discretion upon the subject. It was decided in *Cheek v. Jefferies* (a), and in other cases which have since occurred, that the statute 53 G. 3. c. 141. s. 2. requires that the Christian names of the subscribing witnesses to the securities should be inserted in the memorial. The warrant of attorney, therefore, in this case was not correctly memorialized, and the rule for setting aside the warrant of attorney and the judgment must therefore be made absolute.

Rule absolute accordingly.

(a) 2 B. & C. 1.

1826.

HOWELL *against* YOUNG, Gent. One, &c. (a)

DECLARATION stated, that before the committing of the grievance thereafter mentioned, the plaintiff had contracted with *J. Olive* and *R. Olive*, to lend them the sum of 3000*l.*, at interest, the repayment of that sum, with interest, to be secured by a warrant of attorney to confess judgment made by *J. and R. Olive*; the sum of 2000*l.*, with interest, to be further secured by a mortgage of certain freehold premises of the said *J. and R. Olive*; and the sum of 1000*l.* to be further secured by a mortgage of certain leasehold premises of *J. and R. Olive*, provided the said warrant of attorney and mortgages should be found to be a good, valid, and sufficient security for the same; and thereupon on, &c., at, &c., the plaintiff, at the request of the defend-

Declaration stated that the plaintiff had contracted with *A. B.* to lend him the sum of 3000*l.* at interest; the repayment, with interest, to be secured by a warrant of attorney and certain mortgages of freehold and leasehold premises, provided they should be found to be a sufficient security for the same; that the plaintiff retained defendant as an attorney, to

ascertain whether they would be a sufficient security; that the defendant accepted such retainer, and that it became his duty to use due care and diligence to ascertain whether the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.* and interest. Breach, that defendant did not use due care and diligence in that behalf, but wholly neglected so to do, and, on the contrary, falsely represented to the plaintiff, that the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.* with interest, whereupon the plaintiff lent the 3000*l.* to *A. B.*; that they were not a sufficient security, by reason whereof the plaintiff had wholly lost the interest due and payable on the said sum of 3000*l.* amounting to a large sum, to wit, the sum of 1000*l.*, and was likely wholly to lose the said principal sum of 3000*l.* At the trial it appeared, that in the year 1814 the defendant had been retained by the plaintiff to ascertain whether the warrant of attorney and mortgages were a sufficient security for the 3000*l.* and interest, and that at that time he represented they were so. In the year 1820, (the interest to that time having been regularly paid,) it was discovered that the warrant of attorney and mortgages were not a sufficient security: Held, that the misconduct or negligence of the attorney constituted the cause of action, and that the statute of limitations began to run from the time when the defendant had been guilty of such misconduct, and not from the time when it was discovered that the securities were insufficient.

(a) Three of the Judges of this Court sat, as upon former occasions, from Tuesday, the 14th of February, to Saturday, the 18th February, inclusive. During that period this and the following cases were determined.

1826.

HOWELL
against
YOUNG.

ant, retained and employed him for reasonable fees and reward to him in that behalf, to ascertain whether the said warrant of attorney and mortgages would be a sufficient security for the repayment of the said sum of 3000*l.*, with interest; and in case the same should appear sufficient, to obtain the proper deeds and writings to secure the repayment of the said sum of 3000*l.* Averment, that the defendant accepted such retainer and employment; that it became and was his duty to use due and proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a sufficient security for the repayment of the said sum of 3000*l.*, with interest; and in case the same should appear sufficient, to obtain the proper deeds and writings to secure the repayment of that sum. Breach, that the defendant, not regarding his duty, &c., but contriving, &c., did not, nor would use due or proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a sufficient security, but wholly neglected and omitted so to do; and on the contrary thereof, on, &c., at, &c., falsely and deceitfully represented and asserted, and caused and procured the plaintiff to believe, that the said warrant of attorney and mortgages would be a good, valid, and sufficient security for the repayment of the sum of 3000*l.*, with interest; whereupon the plaintiff, believing that the said warrant of attorney and mortgages would be a valid and sufficient security for the repayment of the said sum of 3000*l.* with interest, did on, &c., at, &c., advance and lend to the said *J. and R. Olive* 3000*l.*, upon security of the said warrant of attorney and mortgages. The declaration then described the warrant of attorney and the mortgages; that they were prepared by the defendant
by

by virtue of his retainer and employment, and accepted by the plaintiff as a sufficient security for the repayment of the said sum of 3000*l.*, with interest, in consequence of such representation and assertion of the defendant, and that they were not a sufficient security. By means whereof the plaintiff had wholly lost the interest due and payable on the said sum of 3000*l.* amounting to a large sum, to wit, the sum of 1000*l.*, and is likely wholly to lose the said principal sum of 3000*l.* to wit, at, &c. Plea, Not guilty. 2ndly, That the cause of action mentioned in the declaration did not accrue within six years. At the trial before *Burrough J.*, at the Summer assizes for the county of *Gloucester*, 1825, it appeared that the defendant, who was an attorney, had been retained by the plaintiff in the year 1814 to ascertain whether the mortgages mentioned in the declaration were a valid and sufficient security for 3000*l.* and interest. At that time the defendant represented that they were so. The mortgages in fact afterwards turned out to be an insufficient security for that sum, but that fact was not discovered by the plaintiff till the year 1820. The interest was regularly paid until that time. *Burrough J.* was of opinion that the statute of limitations was a bar to the action, but it was insisted that there was fraud upon the part of the defendant, and that the statute of limitations only ran from the time when the fraud was discovered; and *Bree v. Holbech* (a) was cited. The learned Judge suffered the cause to proceed, and finally directed the jury to find for the plaintiff if they were of opinion that the plaintiff had been induced by the fraud of the defendant to advance the money, otherwise for the

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 against
 YOUNG.
(a) *Doug.* 654.

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defendant. The jury found a verdict for the defendant. *Curwood* in last *Michaelmas* term obtained a rule nisi for a new trial upon two grounds, first, that upon the question of fraud the verdict was against the weight of evidence; and, secondly, that in this action the statute of limitations ran, not from the time when the insufficient security was taken, but when the special damage alleged in the declaration, viz., the loss of interest, accrued. The learned judge, having now reported that he was satisfied with the verdict found by the jury, the Court called upon

Curwood, *Maule*, and *Carrington* to support the rule. In *assumpsit* the statute of limitations runs from the time of the breach of promise; for that constitutes the cause of action, *Battly v. Faulkner* (a), *Short v. Mac Carthy* (b); but in a special action on the case, the wrongful act done, and the damage accruing therefrom, constitute the cause of action. The cause of action is not complete until the damage ensues. It is otherwise in trespass, where the cause of action accrues immediately upon the wrongful act done, and if there be any special damages ensuing from it, it merely is the measure of damages, *Fetter v. Beal*. (c) This distinction is illustrated in *Scott v. Shepherd* (d) by *Blackstone J.*, who puts this case: "If I throw a log of timber into the highway, (which is an unlawful act,) and another man tumbles over it, and is hurt, an action on the case only lies, it being a *consequential* damage; but if, in throwing it, I hit another man, he may bring trespass, because it is an immediate wrong."

(a) 5 B. & A. 288.

(b) 3 B. & A. 626.

(c) *Salk.* 11.(d) *Sir W. Blackst.* 894.

In this case it is the consequential damage which makes the cause of action complete. In *Gillan v. Boddington* (a), a question arose upon the *London Dock Act*, which enacted that no action should be commenced against any person for any thing done in pursuance of that act after six calendar months next after the fact committed. The *London Dock Company* had, two years before the commencement of the action, undermined the wall of a wharf in one undivided third part of which the plaintiff's father then had a life-interest, with remainder to his son in fee; in consequence of this undermining the wall fell, but after the plaintiff's title accrued; and it was held that the son might maintain an action, although the wall was undermined during the lifetime of the father. So in *Roberts v. Bead* (b) it was held, that where an action is brought for consequential damages arising from an act done, the period within which the action is to be brought is not to be calculated from the doing of the act, but is to be calculated from the period when the consequential damage has been occasioned which is the foundation of the action. Assuming, however, that as soon as the defendant had been guilty of negligence by taking the insufficient security, the plaintiff acquired a complete cause of action, still he acquired a fresh cause of action by the non-payment of the interest; and that cause of action accrued within the six years.

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 against
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BAYLEY J. This is a case of no difficulty whatever. The only question is, what is the cause of action disclosed in this declaration? It appears to me that the misconduct of the defendant is the gist of the action.

(a) *Ryan & M.* 161.(b) 16 *East*, 215.

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against
YOUNG.

IF the allegation of special damage had been wholly omitted, the plaintiff would have been entitled to a verdict for nominal damages. The plaintiff in this action is entitled to recover a compensation in damages for the injury resulting to him from the misconduct of the defendant. The special damage resulted from that misconduct; but it constituted part only of the injury sustained by the plaintiff, and it is not of itself a cause of action. The declaration is framed so as to shew that the misconduct of the defendant is the cause of action. It states that the plaintiff had contracted to lend 3000*l.* at interest, to be secured by a warrant of attorney and mortgages of specific property there described, provided the warrant of attorney and the mortgages should turn out to be a valid and sufficient security for the same; that the plaintiff retained the defendant (he being an attorney) to ascertain whether they would be a sufficient security; and that it became the duty of the defendant to use due care and diligence to ascertain whether they would be so or not. It then states, that the defendant did not use due care and diligence in that respect, but omitted so to do; and, on the contrary, represented to the plaintiff that the warrant of attorney and mortgages would be a sufficient security, whereupon the plaintiff advanced the money; and that the warrant of attorney and mortgages were not a sufficient security, but were invalid and insufficient securities. Now, if the declaration had stopped there, a sufficient cause of action is stated. There is an acceptance of the retainer by the defendant, a duty resulting therefrom, and a breach of that duty. But the declaration goes on to state: "By reason whereof the plaintiff has wholly lost the interest due on the sum of 3000*l.*,

3000*l.*, and is likely wholly to lose the said principal sum of 3000*l.*" Now, does the introduction of that allegation vary the case? In an action for words which are actionable in themselves, a special damage is frequently alleged in the declaration, although it is not the ground of the action, and the plaintiff may recover without proving the special damage. In such case the allegation of special damage is a mere explanation of the manner in which the conduct of the defendant has become injurious to the plaintiff. So in this case, the purpose for which the allegation is introduced, is precisely similar. Where, indeed, words are not actionable of themselves, but become so by reason of the consequential damage, then it must be alleged and proved; because it constitutes the cause of action. In an action of assumpsit, the statute of limitations begins to run not from the time when the damage results from the breach of the promise, but the time when the breach of promise takes place. The case of *Short v. M'Carthy* (a), which is very analogous to the present, is an authority in point. There the declaration in assumpsit stated as a breach of the promise, that the defendant did not diligently and sufficiently make a search at the bank of *England* to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years. The statute of limitations having been pleaded, it was held, that upon this form of declaration the plaintiff was not entitled to recover on the ground

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(a) 3 B. & A. 626.

that

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that the cause of action accrued at the time of the breach of duty or promise by the defendant, and not at the time of its discovery by the plaintiff; and that the statute began to run from the time when the defendant ought to have made the search, which it was his duty to do. It appears to me that there is not any substantial distinction between an action of assumpsit founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly upon a breach of duty. Whatever be the form of action, the breach of duty is substantially the cause of action. That being so, the cause of action accrued at the time when the defendant in this case took the bad and insufficient security, that was more than six years before the commencement of the action, which is consequently barred by the statute of limitations. The rule for a new trial must therefore be discharged.

HOLROYD J. I am of opinion that the statute of limitations is a complete bar to this action. The cause of action is the misconduct or negligence of the attorney. The statute of limitations is a bar to the original cause of action, and to all the consequential damages resulting from it, unless, indeed, it can be shewn that those damages, or any part of them, constitute a new cause of action which accrued within six years. I think it makes no difference in this respect, whether the plaintiff elects to bring an action of assumpsit founded upon a breach of promise, or a special action on the case founded upon a breach of duty. The breach of promise or of duty took place as soon as the defendant took the insufficient security. Whether the plaintiff, therefore, elect

elect to sue in one form of action or another, the cause of action, which in either form is substantially the same, accrued at the same moment of time. The breach of duty, therefore, constituting a cause of action, it follows that the statute of limitations is a bar to this action, unless the special damage alleged in the declaration constitute a new cause of action. *Fetter v. Beal* (a) is an authority to shew, that the special damage alleged in this case does not constitute any fresh ground of action, but that it is merely the measure of the damage which results from the original cause of action. There the declaration stated that the defendant beat the plaintiff's head against the ground, and that he brought an action of assault and battery for that and recovered; and that since the recovery by reason of the same battery, a piece of his skull had come out. The defendant pleaded in bar the recovery mentioned in the declaration; and averred it to be for the same assault and battery. The plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known; and it was compared to the case of a nuisance, where every new dropping is a new act. But *Holt* C. J. said, "Every new dropping is a *new nuisance*, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." So, here the loss of interest does not constitute a fresh ground of action, but a mere measure of damages. There is no new misconduct or

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Young.
(a) 1 *Salk.* 31.

negligence

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negligence of the attorney, and consequently there is no new cause of action. What is said by *Holt* C. J. explains the principle of the decision in *Gillon v. Boddington* (a); there, although the excavation was made in the life of the father, it was continued after his death, and after the title of the remainder-man had accrued. The continuance of the excavation was a continuing nuisance, and constituted a new cause of action. It was, therefore, properly decided in that case, that the remainder-man was entitled to recover damages for an injury to him arising from the falling of a wall after the death of his father, but here there was no new misconduct of the attorney. As the consequences of the battery in *Fetter v. Beal* did not constitute a fresh ground of action, so the consequential damage resulting from the misconduct of the attorney in this case does not constitute any new ground of action. In that case Lord *Holt* was of opinion that the jury upon the trial in the first action must have taken into their consideration not merely the actual loss which the plaintiff had then sustained, but the probable loss which the plaintiff was likely to suffer in consequence of the injury. So here, if the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security. It appears to me, therefore, that the subsequent special damage alleged in this declaration did not constitute any fresh cause of action. That being so, the cause of action did not accrue within six years, and the rule, therefore, must be discharged.

(a) 1 R. & M. 161.

LITLEDALE J. concurred.

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BAYLEY J. referred to *Brown v. Howard*. (a)HOWELL
against
YOUNG.

Rule discharged.

Taunton, Ludlow, and Campbell, were to have shewn cause against the rule.

(a) 2 B. & B. 73.

WHITCHER *against* JAMES HALL.

DECLARATION stated, that on the 4th of *February* 1824, at, &c. by certain articles of agreement entered into between the plaintiff of the one part, and one *Joseph Hall* and the defendant of the other part, the plaintiff agreed to let, and *Joseph Hall* agreed to take the milking of thirty cows for the sum of 7*l.* 10*s.* per cow per annum, to commence from the 14th of *February* then instant, agreeable to the conditions thereafter specified, that is to say, one quarter's rent to be paid down on or before the said 14th day of *February*, the second quarter on or before the 14th of *May* then next, the third *November*, and the defendant agreed to pay the rent at the times therein mentioned. The plaintiff then averred performance of the agreement by him, and that *A. B.* took the milking of the thirty cows, and alleged as a breach the non-payment by the defendant of the rent, which became due on the 14th of *November*. It appeared in evidence at the trial, that in *May* it was agreed between the plaintiff and *A. B.*, the latter having then thirty-two cows, that the plaintiff instead of taking away two at that time, should be at liberty to take four at the fall of the year, and it appeared that between the 4th and the 30th of *October* the plaintiff did take away four cows, leaving *A. B.* after that period less than thirty. It was proved, that this alteration in the mode of using the cows made no substantial difference as to profit or loss: Held, by *Bayley* and *Holroyd* Justices, *Litlledale J.* dissentiente, first, that this was an entire contract for the letting of thirty cows, neither more nor less; and, secondly, that the plaintiff in this action, against a surety, was bound to prove a literal performance of that contract, that he had not done so, inasmuch as he had shewn that during part of the year he had allowed *A. B.* to have the milking of twenty-eight cows only.

quarter

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vs
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quarter on or before the 14th day of *August*, and the fourth quarter on or before the 14th day of *November* then next; and it was agreed that either party should be at liberty to give notice in writing to determine that agreement previous to the said 14th day of *November* then next, otherwise it was agreed that the said *Joseph Hall* should continue to hold the same from year to year till such notice should be given; and the defendant thereby agreed with the plaintiff to pay or cause to be paid the said rent at the days and times thereinbefore specified for payment thereof; mutual promises were then stated, and there was an averment that after the making of the agreement, to wit, on the said 4th day of *February* in the year aforesaid, at, &c. the said *Joseph Hall* took the said milking, &c., and that the plaintiff had performed the agreement on his part; yet the defendant, not regarding, &c. did not pay 56*l.* 5*s.*, being one quarter's rent, which became due on the 14th *November* 1824. Second count, indebitatus assumpsit, for the milking of divers cows and the feed and pasturage of certain lands, and the use of a certain dairy, yard, and premises, with the appurtenances, by *Joseph Hall*, at the request of defendant, and by the permission of the plaintiff, had held, used, occupied, and enjoyed. Plea, non assumpsit. At the trial before *Littledale J.*, at the Summer assizes for the county of *Hants*, 1825, the plaintiff proved the execution of the agreement set forth in the declaration by *Joseph Hall* and the defendant as his surety, and that on the 14th of *February* next following the date of the agreement, *Joseph Hall* took possession of the dairy, which then consisted of thirty cows, but ten only of those cows had calved. At *Lady-day* the plaintiff put into the dairy two other cows which were milked,

milked, and after that time the plaintiff and *Joseph Hall* from time to time exchanged cows, the plaintiff putting in those fit for milking, instead of others which had not come into milking. In *May Joseph Hall had thirty-two cows, and it was then agreed between him and the plaintiff, that instead of the latter taking out the two additional cows, he should be at liberty to take out four at the fall of the year.* It was proved by *Joseph Hall*, that this new arrangement, as to the number of cows which he was to have from time to time, made no difference as to profit or loss. Between the 4th and the 20th of *October* the plaintiff took away four, and thereby reduced the number to twenty-seven cows, one having died in the interim. On the 14th of *November Joseph Hall* refused to continue in the dairy, and delivered up the possession. The plaintiff thereupon demanded from the defendant payment of the quarter's rent, which, by the terms of the agreement, became due on that day. The latter having refused to pay, the present action was commenced. It was objected at the trial, that as the defendant was a surety, he was bound only by the terms of the agreement to which he had become a party; that it was incumbent upon the plaintiff to shew that he had performed *that* agreement; that he had not done so, inasmuch as he had not allowed *Joseph Hall* to have the milking of thirty cows during the whole year, but at one time only twenty-eight. The learned Judge was of opinion that the contract was in its nature divisible, that it had been substantially performed by the plaintiff, and that the plaintiff was entitled to recover from the defendant rent in proportion to the number of cows actually supplied to the defendant; and a verdict was found for the plaintiff for 40*l.*, but liberty was reserved to the defendant to move

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 Warrant
 against
 Hays.

to

1826.

Whitworth
against
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to enter a nonsuit. A rule nisi for that purpose having been obtained in last *Michaelmas* term,

Merewether and *E. Lawes* now shewed cause. It was sufficient for the plaintiff to shew that he had performed the contract substantially, and that he has done, for it was proved that the defendant during the whole period of his occupation had upon an average the milking of thirty cows. That was a substantial though not a literal performance of the original agreement. It is true, that in pursuance of a subsequent agreement between the plaintiff and *Joseph Hall*, the latter had at one time thirty-two cows, and at another only twenty-eight, but the alteration in the agreement was immaterial: it made no difference as to profit and loss: the surety not being prejudiced by it, is not discharged. But, secondly, the plaintiff is at all events entitled to recover rent pro rata, in proportion to the number of cows, because according to the true construction of the agreement, the permitting of the defendant to have the milking of thirty cows was not a condition precedent to his paying the rent of 7*l.* 10*s.* per cow. The rule laid down in *Boone v. Eyre (a)*, and recognised in many subsequent cases, is that where a covenant goes to the whole of the consideration on both sides it is a condition precedent; but where it does not go to the whole, but only to a part, it is not a condition precedent. The promise to let *Joseph Hall* have the milking of thirty cows does not go to the whole of the consideration agreed to be paid: it could not be intended, that if *Joseph* had twenty-nine cows only, he was to pay no rent at all. The very circumstance, of the rent being

(a) 1 *H. Bl.* 273.

reserved at so much per cow, shews that he was to be paid in proportion to the number of cows. The fair construction of the contract is, that the rent was to be paid pro rata for all the cows provided by the plaintiff.

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C. F. Williams and *R. Bayly*, contra. The defendant, who is a surety, is only bound by the terms of the agreement to which he became a party. In order to entitle the plaintiff to recover on the count on the special agreement, he must shew that he has performed that agreement. Now he has only shewn that he has performed it in part. Assuming that it was sufficiently proved, that he had allowed *Joseph Hall* the milking of thirty cows until the 4th of *October*, it is equally clear that, between that and the 20th, he took away four, so that even if he was not bound to replace the one which had died, (which may be doubtful,) still *Joseph Hall* during that period had less than thirty cows. Assuming also that the new agreement between the plaintiff and *Joseph Hall*, by which it was stipulated that the latter was to have thirty-two cows at one time and twenty-eight at another, was equally beneficial to *Joseph Hall*, still the defendant was no party to it, and was not bound by it. *Nesbit v. Smith* (a), *Rees v. Berrington* (b), and *Samuell v. Howarth* (c), are authorities to shew that any alteration in the contract without the consent of the surety discharges the latter, even where the alteration is beneficial to him. The same principle has been acted upon in cases of bonds, conditioned for the faithful services of a clerk. Thus where the condition was, that a clerk should serve faithfully, and account for all money to the obligee and his *executors*, it was held that the obligor

(a) 2 Bro. Ch. Ca. 579.

(b) 2 Ves. jun. 542.

(c) 3 Mer. 272.

1896.

WATKINS
against
HALL.

was not liable for money received by the clerk in the service of the *executors* of such obligee, who continued the business, and retained him in the same employment, *Barker v. Parker*. (a) It is clear that the plaintiff cannot recover on the second count, because *Joseph Hall* had no use of the cows or dairy during the period in respect of which the rent is claimed. If due at all, it can only be by reason of the special agreement.

BAYLEY J. I think that the rule for entering a non-suit ought to be made absolute. By the agreement which is set out in the declaration, the plaintiff agreed to let, and *Joseph Hall* agreed to take, the milking of thirty cows (not more nor less) for the sum of 7*l.* 10*s.* per cow per annum, to commence on the 14th of *February* 1824, and on the conditions therein mentioned. The agreement was, that *Joseph Hall* was to have the milking of thirty cows, and the benefit was to enure to *Joseph* not to *James*, but the latter stipulated that he would pay the whole rent. One question is, whether that is an entire contract as to the number of cows. If it be, *Joseph* was entitled to have the milking of thirty cows during the continuance of the term. If it was not an entire contract, but a contract to pay for so many cows as the plaintiff should supply, and the plaintiff supplied twenty-nine or any other number, he would be entitled to payment for so many. I am of opinion that this was an entire contract for the purchase of thirty cows; and if at the commencement of the term the plaintiff could not insist that this was a divisible contract, it must follow that it continued an entire contract during the term. I do not enter

(a) 1 T. R. 387.

into the question whether there was a performance of the contract at the commencement of the term. It is sufficient to say that there was a new agreement, without the knowledge of *James*; that *Joseph* was to have the milking of twenty-eight cows during one part of the year, and thirty-two during the other part. That, as it seems to me, was not a continuance of the original bargain, which was for the milking of thirty cows, but a new agreement. The new agreement was binding only on those persons who were parties to it. If it had been intended to bind *James* by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then *James* is bound by it, otherwise he is not. There is no hardship upon the plaintiff, for he knew that *James* stipulated to pay the rent upon his, the plaintiff's, fulfilling the terms of the original bargain, and that he, *James*, was not bound to consent to the substitution of a new contract. In *Heard v. Wadham* (a), and *Campbell v. French* (b), it was held that the performance of a contract, substantially the same as that originally made, did not give a right of action against a surety who had not consented to the alteration. Here the plaintiff attempts to maintain his action by proving the performance not of the

1826.

 WHITAKER
 against
 HALL.

(a) 1 East, 619.

(b) 2 H. Black. 165. 6 T. R. 200.

1826.

WILSON
against
HALL.

contract declared on, but of a subsequent agreement. But he has averred, and was bound to prove performance of the original agreement. That he has not proved; and, upon that ground, I am of opinion that he was not entitled to recover, and that the rule for entering a nonsuit ought to be made absolute.

HOLROYD J. I am also of opinion that this action is not maintainable, and that the rule for entering the nonsuit should be made absolute. The defendant stands in the situation of a surety, inasmuch as the plaintiff agrees to let, and *Joseph Hall* to take. If the agreement had stopped here, *Joseph Hall* would be liable to pay the rent, but then there is an additional agreement that *James* also should pay the rent. *Joseph* still, however, continues liable for the rent, and *James* is liable only by reason of his special agreement. This seems to me an entire agreement for the letting of the entire number of thirty cows, neither more nor less. The term *at so much per cow* is introduced only to measure the rent payable. Supposing there was no stipulation that the rent should be paid in advance, it would be incumbent on the plaintiff, if he sought to recover rent, to aver and prove that the rent had accrued due; and that could only be done by shewing that *Joseph Hall* had had the milking of thirty cows during the period in respect of which the rent was claimed. It is stipulated in this case, indeed, that the rent should be paid before the quarter commenced. But still the plaintiff would be bound to aver and prove that he was ready at all times, during the time that the contract continued, to perform his part of the contract. It seems to me that the original agreement was at an end, and that a new agreement

agreement was substituted in its stead, and that *James*, not being a party to it, is not liable for the breach of it. This is very similar to the case of a surrender of a lease by operation of law. In *Comyn's Dig. tit. Surrender, (I. 1.)* it is laid down, if a lessee for years accepts a new lease by parol when the first lease was by indenture, it operates as a surrender in law. So here, the new agreement by parol varying from the first entered into by the plaintiff and *Joseph Hall*, operated as an abandonment of the first agreement. The first agreement having been put an end to by the principal parties, the surety is discharged. For these reasons I am of opinion that the rule for entering a nonsuit ought to be made absolute.

1826.

 WRITING
 against
 HALL.

LITTLEDALE J. It appeared to me at the trial that the plaintiff was entitled to recover. I then thought that there had been a substantial performance of the contract by him; and, although there were some variations in the subsequent contract, it was a case to which the maxim applied, *de minimis non curat lex*. The case having now been fully discussed, I must say that my former opinion continues unchanged. I will first consider whether any action will lie on the original agreement against *Joseph Hall*, because I admit that if no action will lie against him on the original agreement, no action will lie against the present defendant. *James* is only bound by the original agreement. If a new agreement, varying substantially from the former, has been substituted for it, he is not bound by that. I consider the original agreement not an entire, but a divisible agreement; and that although part of it has not been performed, the plaintiff is entitled to recover for that part

1893.

WATSON
AGENTS
HALL.

which has been performed. *Ritchie v. Atkinson* (a) is an authority in point. There the master and freighter of a vessel mutually agreed that the ship should, with all convenient speed, proceed to *St. Petersburg*, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same, on being paid freight, for hemp, 5*l.* per ton; for iron, 5*s.* a ton, &c., one half to be paid on right delivery, the other at three months. It was held that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. Lord *Ellenborough* there recognized the rule laid down in *Boone v. Eyre* (b), that where a covenant goes to the whole of the consideration on both sides, there it is a condition precedent; but where it does not go to the whole, but only to a part, there each party must resort to his separate remedy for the breach of the contract by the other. *Le Blanc J.*, after stating that rule, and observing that it was approved of in this Court in *Campbell v. Jones* (c), and by the Court of Common Pleas in the *Duke of St. Alban's v. Shore* (d), proceeded, "Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight, because the failure of bringing home one ton less than the full quantity of 400 tons would prevent the plaintiff from recovering for the 399 tons which he might have brought over. The loss on his part by such a construction would bear no sort of proportion to

(a) 10 *East*, 295.(c) 6 *T. R.* 573.(b) 1 *H. Black.* 273.(d) 1 *H. Black.* 278.

the injury suffered by the defendant. The fair construction, therefore, is, that the plaintiff should recover freight for what he has performed; and that the defendant should have a remedy against him for that which he has not performed, and which he ought to have done." It appears to me that this reasoning applies strongly to the present case. Here the allowing the defendant to have the milking of the entire number of thirty cows does not go to the whole consideration, viz. the rent; if it did, the neglect to furnish any one of the cows would prevent the plaintiff from recovering for the twenty-nine which he had provided; or if the contract had been for 500 cows, he could not have recovered any rent if he had provided 499. It appears to me that the fair construction of the contract is, that *Joseph Hall*, having had twenty-eight cows, ought to pay for them on the same principle as the freighter in *Ritchie v. Atkinson* was held liable to pay for that part of the cargo which was brought home. Upon the authority of that decision, and the cases there cited, I am of opinion that an action on the original agreement was maintainable against *Joseph Hall*. This case has been compared to that of a surrender of a lease by operation of law, in consequence of the lessee's accepting a new lease. In that case the acceptance of the new lease puts an end to the old lease. But in *Comyn's Digest*, tit. *Surrender*, (I. 2.) it is expressly laid down, that if a lessee surrender or accept a new lease of *part* of the estate, that will operate as a surrender for that part only. Assuming that there is an analogy between the two cases, the new agreement related to two cows only, and the old agreement relating to the twenty-eight cows was

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not put an end to, but remained as before. Supposing, therefore, that the plaintiff might have recovered against *Joseph Hall* upon the old agreement, it then becomes necessary to consider what is the effect of the new agreement, as to the surety. Now if the situation of the surety be substantially varied by the new agreement he is discharged. It has frequently been decided, that where time is given by a principal to his debtor the surety is discharged, because, by giving time, the surety is prevented from recovering against the other party. Thus, if the holder of a bill of exchange give time to the acceptor, he discharges the indorser. In *Eyre v. Bartrop* (a), where time was given to the grantee of an annuity, it was laid down, that if by any arrangement between the creditor and the debtor the situation of the surety be altered, the surety is discharged. In *Davie v. Prendergrass* (b) it was decided in this court, that it was no defence in a court of law, to an action on a bond against a surety, that by a *parol* agreement time had been given to the principal. That case afterwards went into a court of equity (c), upon a bill filed by the sureties to restrain the action upon the bond, and to have it delivered up, on the ground that the creditor had given time to the principal without the surety's consent. Yet, inasmuch as the situation of the surety was not thereby made worse, it was held, that the surety was not discharged. There is another class of cases where the surety has been held to be discharged, on the ground of fraud; to that principle I agree. But fraud ought to be distinctly proved. Here it is clear that no fraud was intended. I think, that in order to

(a) 3 *Mad.* 231.(b) 5 *B. & A.* 187.(c) 6 *Med.* 124.

discharge a surety by a variation in the contract, it ought to appear, that the relative situation of the parties has thereby been altered. Here, it appears to me, that the situation of the surety has not been substantially varied. Suppose a person were to agree to supply to another twenty bales of cloth per week during the year, and there was a surety to that agreement, and that it was afterwards agreed between the two principal parties that during some weeks in the year only ten bales should be supplied, and during others thirty, so that at the end of the year the same quantity would be supplied; I think such an alteration in the mode of supplying the cloth would make no difference as to the liability of the surety. The situation of the parties would not thereby be substantially altered; and if that be so, I think the surety is bound, otherwise he is not. Or suppose there be an agreement between a landlord and tenant, to let the tenant 100 acres of land, with a surety for payment of the rent, and it not being convenient for the tenant to take up the whole, he in fact had possession only of fifty. That being for the benefit of the surety, he would not be discharged. I think a surety has no right to complain, either in a court of law or equity, if there has been a substantial performance of the agreement entered into by him. Another way of trying the question is this: suppose the plaintiff had declared upon the original agreement for the letting of thirty cows for the year, and he had proved an agreement to let twenty-eight at one time of the year and thirty-two at another period of the year, so that during the whole of the year, upon an average, the defendant would have had thirty cows, would that have been a variance? I think that the contracts are substantially the same, and that there would be no variance.

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variance. In *Hands v. Burton* (a), proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff, for 31*l.* 10*s.*, and at the same time agreed, that if the plaintiff would take the horse at that value, he the defendant would buy another horse of the plaintiff's brother for 14*l.* 14*s.*; and that the difference only should be paid to the defendant, was held to support a count, charging only, that, in consideration that plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the 31*l.* 10*s.* There, the contract stated in the declaration and that proved, were held to be substantially the same; they certainly were not literally the same. So, in *Barbe q. t. v. Parker* (b), in an action for a penalty, under the statute 12 *Ann. c.* 16., the declaration stated a specific sum of money to have been lent (in which the usury consisted) but the evidence was, that the loan was partly in money, and the rest in goods of a known value, which the party receiving the loan agreed to take as cash, and this was held to be good evidence to support the declaration, on the ground that it was substantially a loan of money. These cases shew, that where the contract proved and the contract declared upon are substantially though not literally the same, there is no variance. Here it appears to me, that the substituted contract was in substance the same as the original contract, and the performance of the former was a substantial performance of the original contract. It appears to me, that where there is a substantial performance of the contract, the surety does not get rid of his

(a) 9 *East*, 349.(b) 1 *H. Black* 283.

liability.

liability. I admit, that if the old agreement were put an end to entirely, the surety is not liable; but it appears to me that it was not put an end to in this case. The new agreement only related to the two cows. The old agreement continued as to twenty-eight cows; and I think that the plaintiff is entitled to recover pro rata as to that number; and that being so, that there ought not to be a nonsuit or new trial. But as my learned Brothers are of a different opinion, the rule for entering a nonsuit must be made absolute.

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against
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Rule absolute.

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Declaration stated that the plaintiff distrained certain goods for

97l. 10s. rent;

that the tenant made his plaint to the defendant, then being sheriff of the county of C., praying that the goods might be replevied; that thereupon the defendant being sheriff took a replevin bond from the tenant, and two sureties conditioned for the appearance of the tenant at the next county court, and for his prosecuting his suit with effect, which he had commenced against the plaintiff and her bailiffs for taking the goods, and for making a return of the goods distrained, if a return should be adjudged. It then stated, that the sheriff replevied and delivered the goods to the tenant; that the latter appeared at the next county court of the sheriff, and there levied his plaint against the plaintiff and her bailiffs, for taking and detaining his goods and chattels, &c. which plaint afterwards, to wit, on the 25th March 1823, was duly removed out of the county court of the said sheriff of the county of C. into the court of great sessions, by a writ of re. fa. lo. It then stated the declaration in the suit in replevin, the avowry and cognizance for rent in arrear, and that such proceedings were thereupon had, that it was considered by the Court that the tenant should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, and that the defendants in replevin should go thereof without day, and that they should have a return of the goods. And after reciting that it was the duty of the defendant as sheriff to take care of the replevin bond, the present declaration alleged that the tenant did not make a return of the goods according to the condition of the writing obligatory, but therein made default, whereby the bond became forfeited. Breach, that the defendant lost the bond, whereby the plaintiff was damnified. At the trial it appeared, that, in December 1822, when the replevin bond was taken, the defendant was sheriff of the county of C., but that at the time when the plaint was removed out of the county court, he had ceased to be sheriff: Held, that this was no variance, the substance of the allegation being, that the plaint was removed out of the county court in which it was levied, and that having been proved by the record of the judgment in the replevin suit. It appeared that the jury, after finding that the rent in arrear was 97l. 10s., and assessing the damages besides costs, at the prayer of the plaintiff and her bailiffs, according to the statute 17 Car. 2. c. 7. proceeded to inquire of the arrears of rent, and the value of the distress, and found the arrears to be 97l. 10s., and the value of the distress to be the same. Besides the common law judgment, as stated in the declaration, there was a judgment under the statute 17 Car. 2. c. 7. that the defendants should recover against the plaintiff in replevin 97l. 10s., and another sum for costs, and that the defendants should have execution thereof. There was also a prayer by the defendants in replevin, for a writ of fi. fa. to the sheriff, and averment that it was granted to them, and it was proved that a fi. fa. in fact issued, to which the sheriff returned nulla bona, but it was not proved that any writ de retorno habendo had been issued: Held, that the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with success, that being a breach within the meaning of the words "prosecuting with effect," and, therefore, that the plaintiff in this action had sustained an injury, and was entitled to recover, although no writ de retorno habendo had been issued.

Held also, that although the plaintiff had elected to proceed under the statute 17 Car. 2. c. 7. still he was not confined to his execution under that statute, but might also proceed against the sureties upon the replevin bond, or against the sheriff for his negligence in the loss of it.

Held also, that assuming the plaintiff had not proved the breach alleged in the declaration, yet as it appeared that there had been a breach of the condition of the bond by reason of the plaintiff in replevin not having prosecuted his suit with effect, the plaintiff was entitled to recover, although a breach in that respect was not formally assigned.

thereto-

theretofore, to wit, on the 20th of *December* 1822, aforesaid, in the parish of, &c., in the county of *Carmarthen*, in a certain close called *Whitehall*, took and detained certain cattle, goods, and chattels (which were described) of one *Evan Treharne*, then being on the said last mentioned premises, of great value, to wit, of the value of 200*l.*, for the sum of 97*l.* 10*s.* then due and owing to the plaintiff as executrix as aforesaid, for rent; that the said *Evan Treharne* afterwards, and within the space of five days then next ensuing, to wit, on the said 23d day of *December* 1822, to wit, at, &c., made his plaint to the defendant, then being sheriff of the said county of *Carmarthen*, out of the county court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said *Evan* by the plaintiff and the said *David* and *Rees*, and prayed that the said cattle, goods, and chattels might be forthwith replevied by the said sheriff, and delivered to him, the said *Evan*, and thereupon the defendant, so being sheriff of the said county of *Carmarthen* aforesaid, according to the form of the statute in such case made and provided, did take from the said *Evan* and two persons, to wit, *J. Haines* and *J. Treharne*, as two responsible sureties, a bond in double the value of the said cattle, goods, and chattels, to wit, in the sum of 184*l.* 17*s.* 6*d.*, bearing date, &c. 23d *December*, conditioned for the appearance of the said *Evan*, at the next county court after the date of the said writing obligatory to be holden and kept for the county of *Carmarthen*, and for his prosecuting there with effect his suit which he had commenced against the said *R. Koble*, and the said *David* and *Rees*, for the taking and unjustly detaining the cattle, goods, and chattels in the said condition

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dition mentioned, being the cattle, goods, and chattels so distrained as last aforesaid, *and for making a return of the said last mentioned cattle, goods, and chattels, if a return thereof should be adjudged*; and thereupon the defendant so being sheriff, &c., at the prayer of the said *Evan*, replevied and made deliverance of the cattle, goods, and chattels to the said *Evan*, and he afterwards appeared at the next county court held for the said county of *Carmarthen*, and in the same court, without the writ of our lord the king, levied his plaint against the said *F. Kelle, David, and Rees*, for the taking and unjustly detaining the said cattle, goods, and chattels of the said *Evan*, and found pledges as well for prosecuting his said plaint as for returning the said cattle, goods, and chattels, if return thereof should be adjudged by law; which said plaint afterwards, to wit, on the 25th day of *March* 1823, was duly removed, at the instance of the plaintiff and the said *David Evans and Rees Jones*, out of the county court of the said sheriff of the said county of *Carmarthen* into the court of great sessions for the said county of *Carmarthen*, by virtue of his majesty's writ of *recordari facias loquelam*, returnable before the justices the first day of the next great sessions; and thereupon the said *Evan* afterwards, to wit, at the next great sessions held for the said county, to wit, on the 7th of *April* 1823, at, &c. (The declaration in replevin, and the avowry and cognizance by the present plaintiff and her bailiffs for rent in arrear, were then set out.) The count then proceeded to state that such proceedings were thereupon had in the said plea in the court of great sessions; that afterwards, to wit, on the 14th day of *August*, in the year 1824, to wit, at, &c., before the aforesaid justices, it was considered
in

in and by the said court; that the said *Evan* should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, and that the said *Frances Keble, David, and Rees*, should go thereof without day, and that they should have a return of the said last mentioned cattle, goods, and chattels as by the record, and proceedings thereof remaining in the said court of our said lord the king of great sessions, more fully appears. And whereas it was the duty of the defendant, so being sheriff as aforesaid, and having so taken the said writing obligatory, to have taken due and proper care thereof, so as to have been able to assign the same to the plaintiff executrix as aforesaid, in case the same should become forfeited, and she should be entitled to have the same assigned to her according to the form of the statute in such case made and provided, and should require the same to be assigned to her; and the plaintiff, executrix as aforesaid, in fact, says, that the said *Evan* did not make a return of the said cattle, goods, and chattels, or any of them, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but wholly neglected and omitted so to do, and therein failed and made default, whereby the writing obligatory became, and was forfeited to the defendant, and the plaintiff, as executrix as aforesaid, was entitled and was minded and desirous to have the same assigned to her, but she in fact says, that the defendant, not regarding his duty in that behalf, took so little care of the writing obligatory, that the same, by and through his negligence and default, was, after the giving thereof to the defendant as such sheriff, to wit, on, &c., lost; and by means thereof the plaintiff executrix as aforesaid, was hindered and prevented from having or obtaining

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an assignment thereof, and by means thereof she has been, and is, hindered and prevented from bringing an action or actions on the said last mentioned writing obligatory, and has been and is deprived of the means of recovering the said arrears of rent, and the costs of the said action, and has been otherwise greatly injured and damnified, to wit, at *Carmarthen* aforesaid. Plea, Not guilty. At the trial before *Burrough J.*, at the Summer assizes for *Herefordshire* 1825, it appeared that in 1822 the defendant was sheriff of the county of *Carmarthen*, and that on the 23d of *December* in that year he took the replevin bond mentioned in the declaration. The plaint in replevin was removed out of the county court on the 25th of *March* 1823, the defendant at that time having ceased to be sheriff of the county. By the record of the judgment in the replevin suit in the court of great sessions, it appeared that the jury, after finding the tenancy, and that the rent in arrear was 97*l.* 10*s.*, and assessing the damages besides costs, at the prayer of the present plaintiff, and her bailiffs, according to the statute 17 *Car. 2. c. 7.*, proceeded to inquire of certain arrears of rent, and the value of the cattle, goods, &c., distrained, and they found the arrears to be 97*l.* 10*s.*, and the value of the distress to be the same. The judgment of the Court was first the common law judgment, that the plaintiff should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, and that the defendants in the replevin should go without day, and that they should have a return of the goods and chattels to hold to them irreplevisable for ever. There then followed the judgment given by the statute 17 *Car. 2. c. 7.* that the defendants in replevin should recover against the plaintiff in replevin the sum
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of 97*l.* 10*s.* the arrears of rent, and 139*l.* 17*s.* for costs, making together 237*l.* 7*s.*, and that the defendants should have execution thereof. The record also contained a prayer by the defendants in replevin for a writ of fieri facias to the sheriff of *Carmarthen* to levy the above arrears of rent and costs, and a grant thereof by the Court. Proof was given that a fi. fa. issued, to which the sheriff returned nulla bona, but there was no proof that any writ de retorno habendo had been issued. An application was made to the agent of the defendant to assign the bond, and he admitted that it had been lost. Three objections were made upon the part of the defendants; first, that there was a variance, inasmuch as it was averred in the declaration that the plaintiff was removed out of the county court of the *said sheriff* of the county of *Carmarthen*, and the defendant being the only person described in the declaration as sheriff, that allegation imported that the plaintiff was removed out of the county court of the defendant, he being sheriff, but the proof was, that he, at that time, had ceased to be sheriff. 2dly, That the action was not maintainable, inasmuch as the plaintiff had sustained no injury by the loss of the replevin bond, because the bond could not have been enforced upon the judgment, previously to the issuing of a writ de retorno habendo, and a return of elongata thereon. 3dly, The avowant in replevin having elected to proceed under the 17 *Car. 2. c. 7.* was confined to her execution under that statute, and could not afterwards proceed, either against the sheriff, or against the sureties upon the replevin bond. The learned judge was of opinion, first, that there was no variance, inasmuch as the substance of the allegation was, that the record was removed out of the county

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court, and that it was wholly immaterial who was the sheriff at the time. 2dly, That the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with *effect*, and, therefore, that the plaintiff in this action had sustained an injury by his loss of the bond, although he had not sued out a writ de retorno habendo. 3dly, He was of opinion that the avowant, although he had proceeded under the statute 17 *Car. 2. c. 7.*, was still entitled to proceed against the sheriff, or on the replevin bond, as the remedy given by that statute was cumulative. The jury, under the direction of the learned judge, found a verdict for the plaintiff for 184*l.* 17*s.* 6*d.*, but liberty was reserved to the defendant to move to enter a non-suit. A rule nisi for that purpose having been obtained in last *Michaelmas* term, the case was argued before *Holroyd* and *Littledale*, justices, at the sittings in banc before last *Hilary* term, when cause was shewn against the rule by

Taunton, Campbell, Richards, and John Evans. There is no variance, inasmuch as the substance of the allegation in the declaration is, that the plaint had been moved out of the county court in which it had been levied, and that was proved. *Draper v. Garratt* (a) is an authority in point. Assuming the allegation to be one of description, the words "said sheriff" may refer to the person filling the office at that time, and not to the individual who filled it before. At all events, the word "said" may be rejected as superfluous. Secondly, the plaintiff has sustained an injury by the loss of the replevin bond, inasmuch as the condition

(a) 2 *B. & C.* 2.

was not only for a return of the goods distrained, but also for the plaintiff's (in replevin) prosecuting his suit with effect. These are distinct and independent conditions, *Morgan v. Griffith* (a), and breach of any one of them is a sufficient cause of action, *Vaughan v. Norris* (b). *Dias v. Freeman* (c). *Gwillim v. Holbrook* (d). The legal meaning of the term "prosecuting with effect" is to prosecute with success, *Morgan v. Griffith* (e). *Duke of Ormond v. Bierly* (f). *Turnor v. Turner* (g). Now, in this case it appeared that judgment was given against the plaintiff in replevin; he, therefore, did not prosecute his suit with effect, and there has been a breach of the condition in that respect, and the plaintiff has been damnified by the loss of the bond. Thirdly, the plaintiff would be entitled to proceed upon the replevin bond if it had been assigned to him, and he may now proceed against the sheriff for negligence, although he has previously proceeded under the statute 17 Car. 2. c. 7. The remedy given by that statute is cumulative. That point was expressly decided by the Court of Common Pleas in the late case of *Turnor v. Turner* (h). The dictum of Bathurst J. in *Cooper v. Sherbrooke* (i), and the passage cited from *Tidd's Practice* (k), were brought under the consideration of that Court, and they determined that the sureties in a replevin bond were not discharged by the execution of a writ of inquiry under the statute 17 Car. 2. c. 7., and a judgment thereon for the avowant to recover the arrear of rent found, together with a sum for his costs and damages. The same point

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(a) 7 Mod. 380.

(c) 5 T. R. 195.

(e) 7 Mod. 380.

(g) 2 Brod. & B. 107.

(i) 2 Wils. 117.

(b) Cas. Temp. Hard. 137.

(d) 1 B. & P. 410.

(f) Carthew. 519.

(h) Ibid.

(k) 1088. 6th edit.

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was decided by this Court in *Hilary* term 1820, in the case of *Dum v. Dunbar* (a). *Combes v. Cole*, cited from *Com. Dig., Pleader*, 3 K. 31., was decided before the statute 11 Geo. 2. c. 19. s. 22. It forms no part of the digest as published by Lord Chief Baron *Comyn*, but was added by the subsequent editors.

Russell, Archbold, and Chilton, contra. The declaration states, that the plaint was removed out of the county court of the *said* sheriff. This is an allegation describing the court out of which the plaint was removed. It must therefore be strictly proved. Here the proof was, that the plaint was removed out of the county court, not of the defendant, but of another person, it therefore varied materially from the allegation, *Bromfield v. Jones* (b), *Bevan v. Jones* (c). Secondly, this action is not maintainable, because the breach assigned in the declaration is not proved. The declaration, after stating it to be the duty of the defendant to take care of the replevin bond so as to be able to assign the same to the plaintiff, alleges that the tenant, the plaintiff in replevin, did not make a return of the cattle, goods, and chattels, according to the condition of the bond, but omitted so to do, *whereby* the bond became forfeited. The word *whereby* refers to the last antecedent matter, viz. the non-return of the goods. The allegation therefore imports, that the bond became forfeited by reason of there not having been a return of the goods, but inasmuch as the plaintiff did not do that which was necessary to obtain a return, viz. sue out a writ de retorno habendo, the breach assigned is not supported by the proof. [*Holroyd J.* The word *whereby* refers to *all* the antece-

(a) This case was cited from a manuscript note.

(b) 4 B. & C. 380.

(c) 4 B. & C. 403.

dent matter, but assuming that the breach, in respect of the plaintiff's not having prosecuted his suit with effect, is not sufficiently assigned in point of form, yet if it appears to the court upon the declaration, that there has been a breach in that respect, the plaintiff is entitled to recover, *Charnley v. Winstanley*. (a)] At all events the plaintiff is not entitled to recover to the extent of the damages assessed by the jury, inasmuch as the plaintiff in his declaration has not set forth the inquiry as to the arrears of rent, and the value of the distress, and the finding a judgment thereon. But, secondly, that part of the condition of the bond, which requires that the plaintiff in replevin should prosecute his suit with effect, is satisfied by shewing that he prosecuted it to final judgment, without shewing that he prosecuted it with success. The authorities cited on the other side shew, that if by any default of the plaintiff in replevin the suit is not prosecuted to final judgment, the bond is forfeited. But there is no authority to shew, that if the plaintiff prosecute his suit to final judgment, though not with success, the bond is forfeited. In *Morgan v. Griffiths* (b), there was judgment by default against the plaintiff in replevin. In *Turnor v. Turner* (c), judgment was given against the plaintiff in replevin by reason of his not pleading in bar to the avowry. In *The Duke of Ormond v. Bierley* (d), the suit abated by the death of the plaintiff in replevin, yet the condition of the bond was held to be satisfied, although he did not there prosecute his suit with success. The stat. 11 G. 2. c. 19. s. 23. requires the sheriff to take a bond conditioned to prosecute with effect and without delay, and to return

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(a) 5 East, 266.

(b) 7 Mod. 380.

(c) 2 Brod. & B. 107.

(d) Carthew. 519.

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the goods in case a return thereof shall be awarded. Now, if the legislature intended that these words "with effect," should mean, "with success," they never would have added the clause relating to the return of the goods; for in all cases, where a return of the goods is ordered, the plaintiff must necessarily have failed to prosecute his suit with success. The legislature, by this statute, evidently intended to compel the plaintiffs in replevin, first, to prosecute their suits to a final determination without delay; and, secondly, to return the goods replevied, in case they should be unsuccessful in their suits, and judgment *de retorno habendo* should thereupon be given against them. [Littledale J. Are the sureties in replevin analogous to pledges to prosecute at common law? Pledges to prosecute were required at common law in replevin as well as in other actions; but the plaintiff was only liable to be amerced if he became nonsuited, and not if judgment was given against him, *Comyn's Digest, Pleader* (C) 16. In *Co. Litt.* 145 b., it is laid down that the sheriff ought to take two kinds of pledges, one by the common law, viz. pledges to prosecute, and another by the statute *Westminster* 2. c. 2., 18 Ed. 1. c. 2. s. 3., pledges to return the goods; and in *Blackett v. Crissop* (a) it was held, that under that statute the sheriff might take a bond from the plaintiff in replevin, to prosecute, &c. make return, &c. and indemnify the sheriff against the replevin. The sureties in replevin, therefore, were to be responsible for the return of their goods, and to indemnify.] All this is confirmatory of the argument. The sheriff at common law was bound to take pledges to prosecute; the statute of

(a) *Ld. Raym.* 278.

Westminster required him also to take pledges for the return of the goods; and the statute 11 G. 2. c. 19. requires him to take both, with this difference merely, that it gives the penalty for not prosecuting, which at common law belonged to the king, to the defendant. If then the true meaning of the words, "to prosecute with effect and without delay," be to prosecute to a final determination of the suit without delay, the plaintiff in replevin, in this instance, has not been guilty of any breach of the condition of the replevin bond in this respect; for he has prosecuted his suit to final judgment, and without delay. Nor has he been guilty of a breach of the other branch of the condition, namely, as to the returning of the goods, for no return of the goods has been awarded; and even if a return had been awarded, the plaintiff in replevin could not be deemed guilty of a breach of the condition in this respect, until after a writ *de retorno habendo* had been sued out, and returned *elongata* by the sheriff, that being the only legitimate proof of the goods not being returned; in like manner, as in proceeding against bail to an action, a *ca. sa.* must first be sued out and returned *non est inventus*, before the plaintiff can proceed by debt or *scire facias* on the recognizance. Inasmuch, therefore, as there has been no breach of the condition of the replevin bond, the defendant in replevin is not damnified by the sheriff's losing or not assigning the replevin bond; and until she is damnified, she cannot maintain this action. Thirdly, the plaintiff having proceeded upon the statute 17 Car. 2. c. 7., for the arrearages of rent and costs, is confined to his execution under that statute. It is expressly laid down in *Tidd's Practice* 1088. 6th edit., that he cannot, after having had a writ upon that statute, have a writ of

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retorno habendo, nor proceed against the pledges on account of the plaintiff's not making a return of the cattle or goods, nor, as it seems against the sheriff, for taking insufficient pledges. *Combes v. Cole* is an authority in point to the same effect.

HOLROYD J. I am of opinion that there is no variance in this case. It seems to me that the averment, that the plaint was removed out of the county court of the said sheriff, is not an allegation of description, but of substance. It imports that the plaint was removed out of the county court in which it had been levied, and that has been proved. It was a matter wholly immaterial who the individual was who presided in that court at the time when the plaint was removed. *Draper v. Garratt* (a) is an authority to shew that it is sufficient. There the declaration against a sheriff for taking insufficient pledges in a replevin bond, stated that the party replevying levied his complaint at the next county court, to wit, at the county court held before *A. B.*, and *C. D.*, suitors of the court, which plaint was afterwards removed by re. fa. lo.; and by the record it appeared, that the plaint was levied at a court holden before *E. T.* and *G. F.* It was held that the variance was immaterial, because it was unnecessary to state or prove the names of the suitors, and they might be rejected as surplusage. So here in describing the removal of the plaint out of the county court, it was unnecessary to describe the individual who held the office of sheriff at the time. It was sufficient to aver and prove that the plaint was removed out of the court in which it had been levied. As to the principal points discussed in this case, our decision

(a) 2 B. & C. 2.

must be governed by the case of *Turnor v. Turner (a)*, unless that case be distinguishable upon the grounds stated in argument. Upon those points we will take time to consider before we pronounce our judgment.

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LITLEDALÉ J. Assuming that this be an allegation describing the court out of which the plaint was removed, it appears to me that the word *said* may be rejected as surplusage. The object of the allegation must have been to describe the court not as the court of the individual, but as that of the sheriff. If that word be rejected, the allegation will then be consistent with the fact. For the plaint was removed out of the court of the sheriff of the county of *Carmarthen*.

Cur. adv. vult.

Judgment upon the other points was afterwards delivered by

HOLROYD J. This was an action against the late sheriff of *Carmarthenshire*, tried before *Burrough J.* at the last Summer assizes for *Herefordshire*. A verdict was found for the plaintiff, damages 184*l.* 17*s.* 6*d.* The action was for negligence in the execution of his office. And the questions made at the trial, and upon which a rule was granted to shew cause why the verdict should not be set aside, and a nonsuit entered or new trial granted, arose upon the third count. That count was for negligence in the defendant as sheriff in losing a replevin bond taken by him upon a distress for rent due to plaintiff, executrix, &c. by which she was prevented from having an assignment thereof, and from suing thereon as she would have been entitled to do. One of those questions was a question of variance, which the

(a) 2 *Brod. & B.* 107.

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Court (my brother *Littledale* and myself) disposed of and overruled, upon the argument when cause was shewn against the rule for a nonsuit or new trial. The other question was, whether upon that third count, as framed, and the proof in support thereof that was given at the trial, the action was maintainable. (The learned Judge, after stating that count, proceeded as follows:)

When the record of the above proceedings in replevin was produced and proved at the trial, it appeared by it that upon the jury giving their verdict in favour of the present plaintiff and her bailiffs, the three defendants in that suit, the jury at the prayer of those defendants, according to the statute of 17 *Car. 2.*, having proceeded to enquire concerning the arrears of rent and the value of the distress, found the arrears to be 97*l.* 10*s.*, and that the true value of the distress was also 97*l.* 10*s.*; and, therefore, not only the common law judgment was given against the plaintiff in replevin of *nil capiat per breve*, and his pledges to prosecute being in mercy, and the defendants in replevin thereof going without day, and the judgment *pro retorno habendo*, but also judgment, according to the above statute of *Car. 2.*, for the said arrears of rent (97*l.* 10*s.*) and 139*l.* 17*s.* costs, in the whole, 237*l.* 7*s.*; and that the defendants in replevin have execution thereof. The record also contained the entry of a prayer by the defendants in replevin of a *fi. fa.* to the sheriff of *Carmarthenshire* to levy the above arrears of rent and costs, and that it was granted to them returnable before the justices of the said court of great sessions on the first day of the then next great sessions to be holden in and for the said county. Besides this award of execution, it also was proved at the trial that a *fi. fa.* issued, which was returned by the sheriff *nulla bona*; and there was no proof that any writ

writ de retorno habendo had been issued upon the judgment. And it was objected at the trial that the action therefore was not maintainable, on the ground that the replevin bond could not have been enforced upon the judgment, as set forth in the third count above stated, previous to the issuing of a writ de retorno habendo, and a return of elongata thereon; and, consequently, that the plaintiff had sustained no injury on which to maintain an action against the sheriff for the loss of the replevin bond. And, secondly, that the avowant having elected to proceed under the statute 17 Car. 2. c. 7., could neither proceed against the sheriff nor upon the replevin bond, but was confined to his execution under the statute.

With regard to the first of these two grounds of objection, the want of a writ de retorno habendo, and a return of elongata thereon, it appears to us that a writ de retorno habendo, and a return of elongata thereon, were not necessary, to enable the plaintiff to put the replevin bond in suit against the obligors, in case the same had not been lost, but had been assigned to her; and that the judgment, as stated in the third count, with and even without the averment in that count, that the plaintiff in replevin did not make a return of the cattle, &c. pursuant to the condition of the bond, and without any averment of a writ de retorno habendo, and a return of elongata thereon, shewed sufficiently a breach of the condition of the bond, on which the plaintiff in this suit might maintain an action against the sureties in case the replevin bond had been assigned to her, and, consequently, an action against the sheriff for his negligence in the loss of the bond. This is fully established by the several cases that have been

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been decided upon the subject. If the bond in question had been simply conditioned for a return of the distress (if a return thereof should be adjudged), without more, there might have been something in the objection; but this is a case in which the bond was taken pursuant to stat. 11 G. 2. c. 19. s. 23. (as all others ought now to be) and conditioned not merely for making such return, if it should be adjudged, but also for *prosecuting the suit with effect*; and the condition of the bond is broken and the bond forfeited, as well by not prosecuting the suit with effect as by a default of making a return of the distress on such return being adjudged, each part of the condition being independent of the other, and the bond forfeited by a failure in either. The failure of prosecuting the suit with success is, we think, a failure of prosecuting the same with effect. And this was so even before the statute 11 G. 2. c. 19. In *Chapman v. Butcher* (a), in an action on a similar bond, the defendant pleaded that he had prosecuted the suit with effect in the court below, but that a writ of error was brought in B. R., where the judgment was reversed; to which plaintiff replied that the judgment in B. R. also was that the plaint in the court below should abate, and that there should be a return irrepleviable. On demurrer to this replication, on which other objections were made, (viz. the unlawfulness of the bond, because it was alleged that pledges ought to have been taken, and not a bond, and that the condition did not extend to any judgment of returno habendo in any court but only in the court below where the plaint was levied, and the judgment of that court was then reversed,) judgment was given for the plaintiff in the suit on the replevin bond, although it would seem

(a) *Carthow*, 248.

that

that the replication contained no allegation that no such return was made, (consequently there was no breach of the condition shewn but the not prosecuting with effect,) nor was there any allegation that any writ de retorno habendo issued, or that there was any return of elongata thereon, which, if necessary, ought to have been alleged; but there was only an allegation that the suit was not prosecuted with effect in the court above, that is, with final success, and that a return irrepleviabie was there adjudged. And in a later case, since the statute 11 G. 2., *Gwillim v. Holbrook* (a), where, in like manner, nothing more appeared on the pleadings beyond the judgment de retorno habendo, on demurrer, judgment was given for the plaintiff. It is true that no objection appears to have been made on that account in either of those cases. So in *The Duke of Ormond v. Bierley* (b), in a similar action, where it appeared on the pleadings that the plaintiff in replevin died before the suit was determined, by which the suit abated; but where he had by injunction from the Exchequer, hindered the proceedings till his death, so that it was alleged "he did not prosecute his suit with effect," upon demurrer, the defendant had judgment; for per *Holt* C. J. "this was a prosecution with effect, because there was neither a nonsuit or verdict against *E. C.* (the plaintiff in replevin); and so it is on a recognizance on a writ of error, which is also to prosecute with effect, if the plaintiff is not nonsuit, nor the judgment affirmed, the recognizance is not forfeited." This shews that Lord *Holt's* opinion was, not merely that a nonsuit or non pros for not following up the suit to judgment, but that a judgment against the

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(a) 1 B. & P. 410.

(b) *Carthens*, 519.

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plaintiff in replevin, without his default of following up the suit to judgment; that is, that his not prosecuting his suit with final success and judgment accordingly, whether with or without judgment de retorno habendo, is a breach of the condition. So in *Waterman v. Yea* (a), which was since the statute 11 G. 2. c. 19., it appears the replevin bond was sued upon without any previous writ de retorno habendo, but no objection was made to the action thereon upon that account. But prior to that case, (but whether prior or subsequent to the statute 11 G. 2. does not appear,) it seems in *Morgan v. Griffiths* (b), *Lee C. J.* said that in all replevin bonds there are several *independent* conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any distinct parts of the condition. And it is material that this should be the case, for though a return of the distress may have been actually made, as well as adjudged, yet the avowant may and will still be damnified by reason of his costs of suit, where the distress so returned is not of sufficient value to pay him his costs, as well as his arrears of rent. And in *Dias v. Freeman* (c), in an action by the assignee of the sheriff on a replevin bond, on a declaration stating that plaintiff, as bailiff of *J. W.*, distrained, &c. on *J. Lacey* in the usual form, where the breach was that *L.* did not appear at the county court next after giving the bond, according to the condition; and did not then and there, or in any manner, or at any place or time, prosecute his suit with effect against the plaintiff; and on a special demurrer thereto, the declaration was adjudged good,

(a) 2 Wils. 41.

(b) 7 Mod. 380. (n).

(c) 5 T. R. 195.

and

and the plaintiff had judgment thereon, although non constat that the suit in replevin was legally determined, or what the judgment was, if any, that was given therein, or whether there was any judgment or writ de retorno habendo, and return thereof or not. But the late case of *Turnor v. Turner* (a) is decisive that the not prosecuting the suit with effect, is a breach of the condition, and that an action is maintainable on the replevin bond, although it appeared that the judgment was pro retorno habendo; and although it did not appear that any writ de retorno habendo had issued or been returned, and although there was no allegation that a return had not been made.

That case, too, is also decisive on the other point, and has established, and we think has rightly established, that the avowant, by having elected to proceed under the statute 17 Car. 2. c. 7., is not confined to his execution under the statute, but might proceed upon the replevin bond, if it had been assigned, and may proceed against the sheriff for his negligence in the loss of it, notwithstanding what is stated to have been said by Bathurst J. in *Cooper v. Sherbrooke* (b); that "by statute 17 Car. 2. the legislature intended that the proceeding upon that statute by writ of inquiry, fieri facias, and elegit, should be final for the avowant to recover his damages, and that the plaintiff should keep his cattle, notwithstanding the course of awarding a writ de retorno habendo, which is a right judgment, for the statute has not altered the judgment at common law, but only gives a further remedy to the avowant." The Court of Common Pleas, however, had that case urged to them as in

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(a) 2 Brod. & B. 107.

(b) 2 Wils. 117.

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point to that effect; but after taking time to consider, upon deliberation and reasons stated at length in the report, decided contrary to that doctrine of *Bathurst J.*; and it may be observed, that on adverting to the preamble, as well as to the provisions of that statute, the legislature meant only to facilitate the landlord's remedy against his tenant, and give him additional aid, without in any respect depriving him of the benefit of any remedy or of any proceeding he was entitled to pursue before; and the very circumstance of the old judgment *de retorno habendo* remaining (which *Bathurst J.* allows, and which is allowed on all hands to be the right judgment) notwithstanding the avowant has upon the verdict, and before the giving of that judgment elected to proceed, and actually proceeded upon that statute, seems to shew, that as the old judgment of the common law was not gone or taken away by that election, so the consequences resulting from it still remained, if the avowant should have occasion, or should still choose to crave them in aid. A subsequent case of *Dunn v. Dunbar*, in this court, in *Hilary* term 1820, was cited. That was stated to be an action against the surety in a replevin bond, after judgment in the replevin suit for the arrears of rent under the statute. On a motion by *Mr. Marryat*, to set aside the proceedings on the bond, because the surety is discharged by proceeding under the statute, and on citing *Tidd's Practice*, 1088, where there is a dictum to that effect, but no reference to authority, *Abbott C. J.* is stated, in a note of that case to have said, that the statutable remedy has not taken away the surety's responsibility, and in the absence of authority the rule was refused; but if authority was found, it might be mentioned again; *Holroyd* and *Best J.'s* were present.

sent. It does not appear to have ever been mentioned again. Supposing this to be a correct note of that case, and that it did not come on again, it is in support of our present opinion. The case, indeed, of *Combes v. Cole* (a) was cited, but that case was not only before the stat. 11 G. 2., when the avowant had no right to have the replevin bond assigned or delivered over to him, as he has since that statute; and that case, though it determined that the only mode of proceeding against the sheriff, before the statute 11 G. 2. was in the mode there pointed out, does not establish that the proceeding under the statute 17 Car. 2., without avail, would have been a defence to an action on the replevin bond, if the sheriff had permitted the avowant to sue on it in his own name, or that, if it would, it would be so now, since the statute 14 G. 2. c. 19.; but if it would go to this extent, it has in effect been since overruled.

But it has been urged, that upon the declaration in this cause, it must be taken, that the breach assigned of the condition of this replevin bond, by which the plaintiff is damaged, is the not making a return of the distress as adjudged, and that he has proved no such breach, without shewing a writ pro retorno habendo, and a return of elongata thereon; as the declaration avers, that, by the default of making such return, the bond became forfeited. But though it be true, that immediately after stating such default, it says, *whereby* the writing obligatory became and was forfeited; yet that word *whereby* is not confined, we think, to that immediately preceding allegation, but extends, also, to the prior averment of not prosecuting the suit with effect,

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(a) *Rep. temp. Hardw. 352.*

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so as to enable the plaintiff to recover upon the declaration, upon proof of facts sufficient to establish that as a breach, which, without going on to further proof which might have been necessary to establish the not returning the distress as a breach, in case no other breach than such non-return had been shewn by the declaration. The case of *Charnley v. Winstanley and Ux (a)* is applicable to this point. It was an action for breach of a covenant made by the wife dum sola, in non-payment of money, pursuant to an award which she had covenanted to abide by and perform. It being alleged in the declaration that the arbitrator made his award *after the intermarriage of the defendants*, it was moved, in arrest of judgment, that the award was void, the submission being revoked in law by the marriage, consequently that no action would lie for the breach of the award, but the Court held that the declaration (shewing a breach of the covenant by a revocation of the submission by the intermarriage between the submission and the award) was valid and sufficient to support the action, though it was a breach of covenant informally and only impliedly alleged, and the declaration was evidently framed upon the idea that the award was good, and meant to charge the nonpayment of the money awarded as a breach of covenant, and the plaintiff had judgment. So in the present case, though the non-return of the distress may have been the thing intended, or mainly intended in the declaration as the breach of the condition, yet if a breach of condition sufficiently appears by the declaration in another respect, viz. in not prosecuting the suit with effect, as we think it does, that is sufficient to support a verdict

(a) 5 East, 266.

for the plaintiff, and entitle him to judgment thereon, though he fails in proving sufficient to establish the breach more prominently set forth.

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But then it has been urged, that the plaintiff upon the proof has recovered greater damages than he was entitled to recover upon the form of the declaration, which, in setting out the proceedings and judgment in replevin, omitted to set forth the inquiry as to the arrears of rent, and the value of the distress, and the finding and judgment thereon; but that point does not appear to have been mentioned at the trial, nor was the rule, that I am aware of, moved on that ground. However, it is clear, that the plaintiff is entitled to recover damages upon the merits if the declaration had stated the whole judgment, or if it should be amended in that respect on a new trial being granted, to the amount she has recovered, supposing her entitled to recover at all, and the objection, if it be one, arises only on the omission to state those parts of the proceedings in the declaration which are omitted. It is a mere objection of form, therefore, but supposing the defendant's counsel were not now too late to urge it, we think the declaration is sufficient to entitle the plaintiff to recover the damages she has recovered, upon the proof given at the trial, which are less than the penalty of the bond, or the damages recovered by the judgment in replevin, inasmuch as the declaration states, that "by means of the loss of the bond, the plaintiff was prevented from obtaining an assignment of the bond, and from suing thereon, and deprived of the means of recovering the arrears of rent, and the costs of the action of replevin, and has been otherwise greatly injured and damnified." And the amount of that loss to the extent of the damages given

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by the jury was proved by the judgment in replevin given in evidence at the trial, though the whole of that judgment was not, and, we think, need not, be stated in the declaration. The rule, therefore, must be discharged.

Rule discharged.

DOE on the Demise of ANN LLOYD against
C. POWELL, J. DAVIES, and J. THOMAS, As-
signees of THOMAS LLOYD, a Bankrupt.

A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the licence of the lessor. The lessee in January 1825, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In April 1825, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of January 1825, was an act of bankruptcy and void, that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture.

EJECTMENT to recover possession of a farm, messuages, and lands in the parish of *Winstanlow*, in the county of *Salop*, formerly occupied by *Thomas Lloyd* the bankrupt. At the trial before *Garrow B.*, at the *Salop* Summer assizes, 1825, it appeared that *Ann Lloyd*, the lessor of the plaintiff, by deed bearing date the 20th of *November* 1795, covenanted with *Thomas Lloyd* that she would, when thereunto requested by the said *Thomas Lloyd*, demise, lease, set, and to farm let unto him the premises for which this ejectment was brought, for the term of forty-one years at the rent of 200*l.* a year. Provided always, and upon condition, that if the rents thereby reserved, or any part thereof, should be unpaid for twenty-one days next after either of the days appointed for payment thereof, or if the said *Thomas Lloyd*, his executors, or administrators, should grant, assign over, pass away, or depart the messuages, mill, lands, tenements, and premises, thereby agreed to be

demised,

demised, or any part thereof, for all or any part of the said term to any person or persons whomsoever, without the consent of the said *Ann Lloyd* thereto first had and obtained *in writing*, that then and in either of the said cases it should and might be lawful to and for the said *Ann Lloyd* into the said premises to re-enter, and from thenceforth that deed, and every thing therein contained should cease, determine, and become void, any thing therein contained to the contrary notwithstanding. In pursuance of this deed *Thomas Lloyd* entered on the premises therein mentioned, and continued to occupy them up to the time of his bankruptcy in *April* 1825, and paid the rent of 200*l.* a year up to *Michaelmas* 1824. *T. Lloyd* having become distressed in his circumstances, in *January* 1825 executed an assignment of all his property real and personal to certain trustees therein named. The trustees acted upon the assignment till *April* following, when a docket was struck against the said *T. Lloyd*, and on the 16th of *April* 1825, a commission of bankrupt was issued against him, and he was thereupon declared a bankrupt, and a messenger under the usual warrant of seizure took possession of the premises in question, and sold the effects upon them, and has remained in possession ever since. Upon these facts it was contended upon the part of the lessor of the plaintiff that there was a forfeiture of the lease by reason of the tenant's interest having been assigned by the deed of *January* 1825 to the trustees therein mentioned. On the part of the defendant it was contended that that deed was wholly null and void, being itself an act of bankruptcy, and that it never had the legal effect of an assignment, and,

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consequently, that the tenant had never, by any voluntary act of his, assigned his interest in the lease. The learned judge was of this opinion, and nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict. A rule nisi for that purpose having been obtained in last *Michaelmas* term, cause was shewn against the rule at the sittings in Banc before *Hilary* term by

Campbell and *Russell*. The personal property of a bankrupt vests in his assignees by the assignment from the time when the act of bankruptcy is committed. The conveyance to the trustees for the benefit of creditors was wholly null and void. Nothing passed by it, and it never operated as an assignment of his interest in the lease. From the instant that the bankrupt executed it there was an act of bankruptcy committed, and at the same instant all the bankrupt's interest in the premises in question, vested in the defendants, not as assignees under the deed, but as assignees by operation of law and by force of the bankrupt statutes. It is clear that such an assignment by operation of law does not work a forfeiture of a lease, *Doe d. Mitchinson v. Carter* (a), *Doe v. Bevan* (b). Besides the law leans against forfeitures; now the assignment, if it be allowed to operate, will work a forfeiture, but the defendants may take, without working any forfeiture.

W. E. Taunton and *G. R. Cross* contra. Assuming first, that the deed of *January* 1825 never operated as a valid conveyance of the property to the trustees, the

(a) 8 T. R. 57.

(b) 3 M. & S. 353.

persons to whom it was intended to pass it, still it did operate, and had the legal effect of divesting *T. Lloyd* of his interest in the lease, and of forcing the assignees of the bankrupt, as tenants on the lessor, without her assent: that is the very effect which it was the object of the lessor to prevent. It, therefore, was a breach of the proviso. But, secondly, this deed did as against the bankrupt operate as a conveyance of his property to the trustees. It so operated the moment it was executed in *January*; and it continued so to operate until the 16th of *April*, when the commission issued. By the terms of the proviso a right of entry is not only reserved for a breach of the conditions, but the lease thereby becomes not voidable, but absolutely null and void. The lease, therefore, having once become void by the breach of the promise, ceased to exist. If no commission had ever issued, there would have been a forfeiture. Is it then to depend upon a subsequent contingency, viz. the issuing of a commission, whether the lease is to be void or not? It is surely absurd to say, that a lease once forfeited by a breach of a condition should again exist as a valid lease upon the happening of a contingency. A commission of bankrupt may rescind what would otherwise be valid, but it cannot set up what once is at an end. Besides, the statutes do not make all deeds conveying away the property of the party an act of bankruptcy, but only fraudulent conveyances. A deed passing away all the property of the bankrupt has been held to be fraudulent as against creditors; and for that reason it is an act of bankruptcy; but if the argument used by the defendants be valid, it may as well be said, that as the deed is therefore absolutely void, nothing passes by it, and that it does not operate

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as a conveyance at all, and therefore it is not an act of bankruptcy. (a)

Cur. adv. vult.

The judgment was afterwards delivered by

HOLBORN J. This was an ejectment for a forfeiture committed by the lessor of the plaintiff's son, who had entered and paid rent, and so became tenant from year to year to the lessor of the plaintiff, under an agreement between them, for a lease to him for a long term of years, that lease never having been executed, but being to be granted subject to a proviso for re-entry, and that the lease should be void on (inter alia) the lessor's assigning or demising the whole or any part of the premises without licence in writing. The tenant holding under that agreement made an assignment of his property by deed (including his estate and interest in these premises) to trustees for the benefit of his creditors, which assignment was void in law, and avoided in fact, as an act of bankruptcy, by a commission of bankruptcy, and the tenant being found and declared a bankrupt thereon, and an assignment to the assignees chosen under the commission; which commission, declaration of bankruptcy, and assignment under the same, were prior to any act or proceeding done or instituted by or on the behalf of the lessor of the plaintiff, either of re-entry or otherwise to avoid the term or tenancy. Consequently the bankrupt's assignment to the trustees not only became void and a nullity ab initio, but was actually avoided by the bankruptcy, and the proceedings

(a) Some other points were discussed at the bar, but have been omitted in the report, as the judgment of the Court did not proceed upon them.

under the same, before any advantage was attempted to be taken of the supposed forfeiture. Under these circumstances, for want of the deed's operating in law as an assignment, it was not in consideration of law an assignment by the bankrupt; but in that respect the same as if no such deed had ever been executed by him; and we think that the answers given to this by the lessor of the plaintiff's counsel, viz. that it would then depend on a subsequent contingency (viz. the issuing of a commission, &c., whether the bankrupt's deed would operate a forfeiture or not, and that it would be good in the interim) is no sufficient answer to this objection against the forfeiture, the bankrupt's deed being void and avoided ab initio, and the title of the assignees of the bankrupt's estate and effects commencing by relation from the time of the execution of that deed. This is no uncommon thing, there are many cases in bankruptcy depending on the like contingency, where the thing done is valid or effective in the interim, but is avoided by the subsequent commission and proceedings. In consequence of that contingency (viz. the proceedings under the bankruptcy) having taken place, no assignment (the event on which the forfeiture was to arise,) has in effect happened, and that event must be fully established, in order to incur and enforce a forfeiture, which is a matter stricti juris. The rule for a new trial must be discharged.

Rule discharged.

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DOX dem.
LLOYD
against
POWELL.

END OF HILARY TERM.

C A S E S

1826.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Seventh Year of the Reign of GEORGE IV.

BRYAN *against* WAGSTAFF.

(In Error.)

Where in error to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the writ of *exigi facias* the plaintiff in error was beyond seas; and defendant pleaded that before the awarding and issuing of the *exigi facias*, plaintiff in

THIS was a writ of error brought to reverse an outlawry in an action of *assumpsit*, and the error assigned was, that before and at the time of the awarding and issuing the writ of *exigi facias* upon which the outlawry was pronounced, the defendant was in parts beyond the seas. To this assignment the defendant pleaded, that before the awarding and issuing of the writ of *exigi facias*, the plaintiff in error of his fraud and covin, and in order to defeat the defendant in error of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of *England*, and, of such his fraud and covin, voluntarily remained in parts beyond the seas until after the outlawry; whereupon issue was joined and found for the defendant: Held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error non obstante veredicto.

pose of avoiding the said outlawry when the same should be pronounced, voluntarily left the realm of *England* and went into parts beyond the seas, and of such his fraud and covin did voluntarily stay and remain in parts beyond the seas until after the awarding of the *exigi facias* and pronouncing of the outlawry. Upon this, issue was joined and a verdict was given for the defendant in error. A rule nisi had been obtained for reversing the outlawry, notwithstanding the verdict found for the defendant upon the issue joined, upon the ground that a departure from the realm before the awarding of the *exigi facias*, though for the purpose of defeating the defendant in error of the means of recovering his debt and of avoiding the outlawry, did not preclude the defendant from reversing the outlawry upon the ground of his being beyond seas at the time when the exigent issued, and *Hesse v. Wood* (a) was relied upon as an authority in point.

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Scarlett and *Chitty* shewed cause. It certainly appears to have been a settled rule that an outlawry is to be considered erroneous when awarded against a party who is absent from the kingdom. That is perfectly reasonable if the party outlawed is not aware of the process, but it is altogether otherwise if he has absented himself in order to avoid the process. The present application was founded upon the decision in *Hesse v. Wood* (b), but the facts then before the Court did not establish any contumacy in the plaintiff in error; it is merely suggested that he went abroad to avoid the action, not to defeat the outlawry. Here it has been found by the jury that he went abroad to avoid the outlawry, and

(a) 4 Taunt. 691.

(b) *Ibid.*

remained

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blamed there until the awarding of the exigent and the pronouncing of the outlawry. In *Co. Litt.* 259. *a.* it is laid down: "Albeit imprisonment be a good cause to reverse an outlawry, yet it must be by process of law invitum, and not by consent or covin; for such imprisonment shall not avoid the outlawry, because upon the matter it is his own act" (*a*). This view of the subject appears to have been taken by the Court in *Matthews v. Erbo* (*b*), where a motion was made to reverse an outlawry upon the ground that the defendant was an alien merchant who was resident abroad during the whole of the proceedings towards the outlawry. "But it was denied by the whole Court; because by such means any person might contract debts and then go beyond sea, and so he would be out of the reach of the law." In *Ashley v. Stockwell* (*c*) the outlawry pronounced when the defendant was abroad was reversed, because it did not appear the defendant went abroad to prevent the outlawry, and the Court could not say when he began to remain abroad with that object. In *Serecold v. Hampsey* (*d*) the Court said: "If the fact were that the party was within the realm during the process of outlawry, and went abroad by way of covin at the time of the exigent, that should be replied." Now that warrants the distinction pointed out between the present case and *Hesse v. Wood*, and the Court would never have said that such a fact should be replied, unless they thought it would, when replied, be sufficient to sustain the judgment of outlawry.

(*a*) This is a comment upon *Litt. s.* 437. which says: "And also if he which is in prison be outlawed in an action of debt or trespass, or in an appeal of robbery, &c., he shall reverse this outlawry against him;" whence it would appear that the commentary was intended to apply to cases of a criminal nature as well as others.

(*b*) 1 *Ld. Raym.* 349.

(*c*) *Barnes*, 324.

(*d*) 12 *Rast.* 624. *n.*

Campbell

Campbell and Patterson contra. This question depends entirely on the validity of the plea. Now, it admits that the plaintiff in error was abroad at the time when the exigent was awarded, it is therefore bad, according to *Comyns' Dig. Outlawry* (C 1.) If this case can be brought within any exception to that general rule, it is for the other side to point it out. The rules as to outlawry are the same in civil and criminal cases, and if this outlawry be good, it follows that a person having gone abroad to avoid a charge of felony may be outlawed and rendered liable to be attainted, without the possibility of afterwards taking his trial for the offence. This consequence is so serious, that the Court will pause before they hold the plea in this case a sufficient answer to the writ of error. *Matthews v. Erbo* (a) is in truth an authority in favour of the present plaintiff in error; the Court indeed refused to reverse the outlawry on motion, but said, "the party might bring error and reverse it if he pleased," plainly shewing their opinion that he had a right to reverse it in that mode. The passage cited from *Co. Litt.* 259. does not apply to absence beyond seas, and it is only by analogy that any argument can be drawn from it. In *Richardson v. Robinson* (b), the error assigned was, that the outlaw was beyond seas when the writ of exigent issued, and thence continually until the outlawry pronounced. Upon traverse of the whole allegation and issue joined thereon, it was held to be sufficient to prove that the outlaw was in parts beyond the seas at the time when the writ of exigent issued. Then *Hesse v. Wood* is expressly in point for the plaintiff in error; the affidavits in that case shewed beyond all doubt, that the party went abroad to

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(a) 1 *Ld. Raym.* 349.(b) 5 *Taunt.* 309.

avoid

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avoid the process; that point was strongly pressed upon the Court, and yet the outlawry was reversed upon motion; the party was not even put to his writ of error. In *Graham v. Henry* (a), it appeared that the party was abroad when the process issued, the Court reversed the outlawry upon motion, and required that bail should be given in the alternative, to render the defendant or satisfy the condemnation money, inasmuch as the party had not gone abroad to avoid the process. Whence it must be inferred, that if he had gone abroad with that view, bail would have been required absolutely, not that the outlawry could not be reversed.

Cur. adv. vult.

In the course of the term the judgment of the Court was delivered by

BAYLEY J. This case came before the Court upon a rule nisi to enter a judgment for the plaintiff in error, non obstante veredicto. The writ of error was brought to reverse an outlawry in an action of assumpsit, and the error assigned was, that before and at the time of the awarding and issuing the writ of *exigi facias*, upon which the outlawry was pronounced, the defendant was in parts beyond the seas. To this assignment the defendant pleaded, that *before the awarding and issuing of the writ of exigi facias*, the plaintiff in error, of his fraud and covin, and in order to defeat the defendant in error of the means of recovering his just debt, and for the purpose of avoiding the said outlawry when the same should be pronounced, voluntarily left the realm of *England*, and went into parts beyond the seas, and of such his fraud and covin did voluntarily stay and

(a) 1 B. & A. 151.

remain in parts beyond the seas until after the awarding of the *exigi facias*, and the pronouncing of the outlawry. Upon this plea issue was joined, and a verdict was given for the defendant in error. The question, therefore, is, whether a departure from the realm before the awarding of an *exigi facias*, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid an outlawry (should any be pronounced) will preclude a defendant from reversing that outlawry, on the ground of his being beyond the seas at the time of the *exigent*, and from thence until after the time of the outlawry; and we are of opinion it will not. An outlawry, even in a personal action, occasions a forfeiture of goods and chattels (2 *Roll's Abr.* 806. l. 40.) and a disability to sue; and where the consequences are so penal, and the outlawry is *primâ facie* erroneous, the Court ought to be cautious before it sanctions a new bar to its reversal. *Rolle*, in his *Abr.*, vol. ii. 804., puts many cases of outlawry, where there is an absence from the realm at the time of the outlawry, but he puts none where the *exigent* is not awarded before the departure. One of the cases there is this: "If a man goes over the sea, of his good will, for his pleasure, or for his own private business, and not for the king's or that of the realm, and then the *exigent* is awarded against him (for felony), and he is outlawed, the outlawry is erroneous, as well as if he had been abroad for the business of the realm; for he being there cannot take cognizance of the proclamations: but if, *after the exigent pronounced*, he departs voluntarily, without any business of the king or the realm, he shall never avoid the outlawry, inasmuch as he was *here* at the time of the *exigent* pronounced, by which he had cognizance of the matter with which he

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was charged; for otherwise, every one might defeat the course of justice by his own act, and remain beyond sea till the witnesses who are to prove him guilty are dead. In this case, however, he may assign for error, that he was beyond sea at the time of the *pronouncing of the outlawry*: for if he were within the realm after the *exigent pronounced*, and departed after, this shall come of the other side." This case, which is also in *Cro. Jac.* 464., makes the award of the exigent the terminus, after which a departure will be penal; but neither this nor any other case attributes any penal consequences to a departure *before the exigent*. In *O'Kearney's case* (a), in an outlawry for treason, the error assigned was, that he was out of England from December till November following, within which periods the exigent was awarded, and the jury was charged to inquire whether he was beyond sea or in England at the time of the award of the exigent; and it being proved that he was abroad from the time of the award of the exigent to the time of the outlawry, though he was not abroad the whole time he had alleged, the Court said *the time of the exigent* was the substance, and the rest of the time immaterial, and the outlawry was reversed. In *Serresold v. Hampsey* (b) the error assigned upon outlawry in a civil suit was this, that the plaintiff in error was beyond sea at the time of the *promulgation of the exigent*; and the Court said, it has been determined that as to the whole process of outlawry, it is not material in the assignment of error to shew that the party was out of the realm during the whole time; if he were abroad at the time of the exigent that is sufficient; for that is the

(a) *Skinner*, 16.(b) *M.* 16 G. 2. cited 12 *Ess.* 624.

substance.

substance. If the fact were that he was within the realm during the process of outlawry (i. e. as I apprehend, whilst the writs of *capias* were in progress) and went abroad by way of *covin* *at the time of the exigent*, that should be replied. All these cases speak of *the award of the exigent* as the period upon which the right of reversal depends; and we are not aware of any case to the contrary; and in *Hesse v. Wood* (a), where a reversal upon motion was opposed upon the ground that the defendant below went abroad to avoid the action, the Court said they had never heard that either the going abroad or the staying abroad with a view to avoid process, was a reason why the defendant should not reverse an outlawry when he returned; and as a plaintiff may proceed by distress infinite to compel an appearance, and is not compelled to make the election of proceeding by *exigent* and outlawry, we see no ground upon principle why it should. The passage from *Co. Litt.* 259 *b.* that imprisonment, if by consent or *covin*, will be no ground for reversing an outlawry, does not appear to us to bear upon the question, for that must be taken to be an imprisonment not merely before the award of the *exigent*, but during the time that *the exigent is in operation, and the process of demanding the appearance of the party is going on*, and the non-appearance by fraud and *covin* during that period, the party being *within the realm at the time*, and wilfully, and of his own act, neglecting to appear when he is capable of doing so, is very different from the case of an absence beyond sea. We are not aware that any distinction has been hitherto made in the proceedings to outlawry, between civil and criminal cases; and it would

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(a) 4 Taunt. 691.

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be very dangerous to lay down a rule in the former which might be urged as a precedent for the latter, even in cases affecting the life of the outlaw. Upon the ground, therefore, that the plaintiff in error does not appear to have been within the realm after the *exigi facias* was awarded, and that a departure before, though for the purpose of avoiding a suit and delaying a creditor, has never yet been deemed a sufficient ground to prevent the reversing an outlawry, we are of opinion the rule should be made absolute; and we have the satisfaction to know, that if we are mistaken in our judgment, the objection is upon the record, and may be reconsidered by a court of error.

Rule absolute. (a)

MARSH *against* HORNE.

A common carrier gave public notice that he would not hold himself accountable for any parcel above the value of 5*l.* if lost or damaged, unless the same were entered as such, and paid for accordingly when delivered. A person who knew that the carrier had given this notice, delivered to him a parcel containing goods (much exceeding the value of 5*l.*), to be carried from *L.* to *B.*, and the carrier accepted them for that purpose. The price of the carriage was not then paid. The carrier knew that the parcel contained goods much exceeding the value of 5*l.* The parcel was lost: Held, that the carrier was not responsible.

ASSUMPSIT against the defendant, a common carrier, to recover a compensation for the loss of two boxes of silk goods which had been delivered to him for the purpose of being conveyed from *London* to *Bath*. Plea, non-assumpsit. At the trial before *Abbott C. J.* at the *London* sittings after *Michaelmas* term 1823, the jury found a special verdict, stating the following facts: The defendant before and on the 21st of *January* 1823, was the proprietor of a stage-coach

(a) This case, and that of *Marsh v. Horne*, were argued in the early part of this term. The judgments were not delivered till *Saturday, May* the 7th.

for

for the carriage of passengers and goods for hire from an inn called the *Cross Keys*, in *Wood Street*, in *London*, to *Bath*, in *Somersetshire*. The defendant before that day, and while he was proprietor of the said coach, published an advertisement, and gave public notice that he would not hold himself accountable for any parcel above the value of 5*l.* if lost or damaged, unless the same should be entered as such, and paid for accordingly, when delivered to the defendant. The plaintiff on the 21st of *January*, at two different times, delivered to the defendant two boxes of the plaintiff containing silk goods, being of a value greatly exceeding the value of 5*l.*, viz. of the value of 226*l.* 3*s.* 8*d.*, to be by the defendant carried and conveyed by his said coach from the said inn to *Bath*, and there to be delivered to the plaintiff, and till so delivered to be kept by the defendant, for a certain reasonable reward to be therefore paid by the plaintiff to the defendant, which two boxes containing silk goods therein, the defendant accepted and received from the plaintiff for those purposes accordingly. The plaintiff paid the defendant two-pence for each of the boxes, for the booking thereof. At the time they were delivered to and accepted by the defendant, the plaintiff knew that the defendant had given such public notice and published the said advertisement, and the defendant knew that each of the boxes with the silk goods contained therein was of a value exceeding 5*l.*, but neither of them was entered by the plaintiff as being of such value, nor paid for accordingly; nor was any such payment demanded by the defendant. The defendant did not safely convey or deliver the same, but the boxes and silk goods, during the progress of the coach in its journey to *Bath*, were lost or stolen from

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the hind boot of the coach, wherein they had been placed by the defendant, but without their being exposed to any greater than ordinary risk, and the same had not since been recovered, whereby the plaintiff had wholly lost the same.

R. Bayly for the plaintiff. By common law carriers were answerable for all losses except such as were occasioned by the act of God or the king's enemies. Notices limiting the responsibility of carriers were introduced and sanctioned by courts of law in order to protect them against the frauds of the owners of goods. The carriers, however, soon attempted to protect themselves by their notices in cases where the loss was occasioned by their own fraud or negligence. In *Beck v. Evans* (a), it was decided that such a notice would not protect a carrier who had been guilty of gross negligence, and *Le Blanc J.* there expressed an opinion that the notice would not apply to goods of a large bulk and known quality where the value must be obvious; and in *Wilson v. Freeman* (b) Lord *Ellenborough* seems to have acted upon that principle. By the contract found by the special verdict the carriage was not to be paid before the final delivery of the goods. The notice does not apply to a case of that description, for the terms of it are that the carrier will not be answerable unless the goods are entered *and paid for* accordingly; but here nothing was to be paid till the end of the journey. The jury find that the carrier was to have a reasonable reward; was that a fixed reward or not? If it was fixed, then he was bound to carry securely for that sum; if it was not fixed, then he was

(a) 16 East, 244.

(b) 3 Camp. 527.

to have what was a fair remuneration for carrying a parcel of great value. Here, by accepting the goods the carrier had undertaken to carry them from *London* to *Bath*: it is found that he knew the value of the goods to be more than 5*l.*, and yet did not demand to be paid for them according to the value: his conduct in that respect amounted to a waiver of the notice. He cannot now be permitted to say that, although he promised to carry the goods, he did not promise to deliver them.

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Curwood contra. It is clearly settled that a carrier may limit his responsibility, and here he has done so by public notice. He has therefore made a special contract, and that contract must be rescinded either by words or acts. Here there are no words sufficient to rescind the contract. Unless the true value of the goods were stated, no contract consistent with the notice could be made. Then, as to the acts, the carrier by accepting the goods did nothing inconsistent with the notice. The notice did not say that he would not carry parcels of greater value than 5*l.*, but that he would not be responsible for them. In *Gibbon v. Paynton* (a) *Yates J.* said, "that if the plaintiff was apprised of the defendant's advertisement, that might be equivalent to personal communication of the carrier's refusal to be answerable for money not notified to him." Now here the plaintiff was acquainted with the advertisement. In *Tyly v. Morrice* (b), 400*l.* sealed up in a bag was delivered to a carrier: he was told it contained only 200*l.*, and it was held that he should be answerable only for 200*l.*, because his reward extended no further.

Cur. adv. vult.(a) 4 *Burr.* 2298.(b) *Carth.* 485.

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The judgment of the Court was afterwards delivered by ABBOTT C. J. This case came before the Court on a special verdict. It is an action against the proprietor of a stage coach, for the loss of two boxes, containing silk goods of very considerable value, sent by the defendant's coach from *London* for *Bath*. The declaration is in the usual form in *assumpsit*. (The Lord Chief Justice then stated the special verdict, and proceeded as follows.) Upon these facts it was contended on behalf of the plaintiff, that as the defendant knew the goods to exceed the value of *5L.*, it lay upon him to demand payment of the insurance, and not having done so, he was to be considered as having waived the benefit of his notice: and that there was an incongruity in allowing a carrier to receive goods for the purpose of carrying them, and yet to say that he was not answerable if he did not carry them: and that as the price of the carriage in this case was to be paid on the delivery of the goods, the defendant might then have charged such a reasonable sum as would remunerate him for his labour and risk. We think, however, that there is not any such incongruity as was suggested. A person may engage to place goods in a course of conveyance and delivery, and yet declare that he will not be answerable for their loss. Indeed, this argument would altogether defeat the notices given by carriers, which have now prevailed in practice for so many years, and been recognized by so many decisions. And considering the notice given in the present case, we think the defendant could not upon the delivery of the goods have maintained a charge for any sum beyond the reasonable price of carriage exclusive of the responsibility of the risk for loss. And as to the first point made in the argument, it may with equal propriety be said that the plaintiff, who

was informed of the defendant's advertisement, and did not offer to comply with its terms, chose to stand his own insurer, as that the defendant, who knew the value of the goods to exceed 5*l.* and did not demand to be paid for insurance, engaged, nevertheless, to take a responsibility upon himself and indemnify the plaintiff. This case differs materially from *Wilson v. Freeman* (a), for there the carrier was not only informed that the goods were valuable and liable to accident, and he might charge what he pleased, but he actually declared his intention to charge at a higher rate than for ordinary goods.

There are two decisions in conformity with our present opinion. The first is *Harris v. Packwood and another* (b). In that case the goods were silk: the carrier had circulated an advertisement, declaring his charge for the carrying of silk goods to be at the rate of 9*s.* 4*d.* per cwt., while for ordinary bulky articles he charged only 6*s.* But he was held to be protected by an advertisement like that which has been published by the present defendant. It is not, indeed, distinctly stated that the carrier at the time he received the parcel knew that it contained silk, but that fact can hardly be doubted, because the parcel was to be conveyed to *Coventry*, where the plaintiff lived; and the defendant had sent a copy of his notice to him there. In this case it was also held that it was not incumbent on the defendant to prove affirmatively that he had used reasonable care, but that the proof of negligence lay on the plaintiff. In the case of *Levi v. Waterhouse* (c), it was proved that the carrier's servant, who received the parcel, knew the value of its contents, but *Gibbs C. J.*,

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(a) 3 *Campb.* 527.(b) 3 *Taunt.* 264.(c) 1 *Price*, 280.

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before whom the cause was tried, held that the mere knowledge of the value did not take the case out of the general rule: and his opinion was confirmed by the Court of Exchequer after argument and consideration, and a rule which had been obtained for setting aside the verdict was discharged. For these reasons, and upon these authorities, we think judgment must be entered for the defendant.

Judgment for the defendant.

Friday,
April 14th.

FOSTER against BLAKELOCK, Executor of
L. BLAKELOCK.

A bailiff employed by an attorney to execute writs, may maintain an action against him for the fees usually paid on such occasions.

A probate stamp is *prima facie* evidence that the executor has received assets to the amount covered by the stamp.

ASSUMPSIT for fees due and payable from the testator to plaintiff as a sheriff's officer, for work and labour in making divers captions and executing divers writs for the testator at his request, and the common money counts. Some counts alleged the promises to have been made by the testator, others by the defendant, as executor. Pleas, general issue, statute of limitations, and plene administravit. At the trial before *Cross Serjt.*, at the *Lent* assizes for *Yorkshire*, 1826, the plaintiff proved that he had been employed by the testator, an attorney, to execute various writs for him, and from time to time delivered an account to him, that he saw the account in question shortly before his death, when he said, "Let it wait awhile," but did not object to the items. Most of the business in question was done more than six years before the commencement of the action, but after the death of the testator, and within the six years, the plaintiff delivered an account to the defendant, who promised to settle it, and it was admitted

that

that this took the case out of the statute. The account so delivered contained a statement of various arrests, for each of which the plaintiff charged 1*l.* 1*s.*, and several sums were charged at the rate of 1*s.* per mile for taking the parties arrested to gaol, and it was proved that on taxation of costs those sums are always allowed by the master. The account also contained two items for poundage upon levies under two writs of *fi. fa.* It was further proved, that the probate granted to the defendant had a stamp of 30*l.*, which is sufficient to cover assets to the amount of 1000*l.* Upon this evidence it was objected, first, that the plaintiff could not maintain an action for fees against the attorney suing out writs; and, secondly, that the evidence did not prove assets in the hands of the defendant as executor. The learned Judge overruled both these objections, and the plaintiff obtained a verdict.

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Wightman now moved for a rule nisi for a new trial, on the ground of misdirection by the learned Judge. In *Dew v. Parsons* (a) and *Bilke v. Havelock* (b), it was decided that a sheriff cannot maintain an action for such fees as are claimed in this case. The sheriff was at common law bound to execute process without reward; certain statutes have since provided a compensation, but the sheriff is for that compensation bound to provide officers to execute the various duties of his office. There is not any reason why the bailiff should have a right to make a claim which cannot be supported by the sheriff, nor is there any case in favour of the present action. [*Abbott C. J.* By employing a particular bailiff, do you not make him your servant?] If that were so, an action

(a) 2 B. & A. 562.

(b) 3 Campb. 374.

would

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would lie against the bailiff for negligence in the execution of his duty, but such actions are always brought against the sheriff. But even if the bailiff could maintain an action for fees of this nature, he should sue the party in the cause and not the attorney, *Hartop v. Jukes (a)*. There it was held that the messenger, under a commission of bankrupt, could not in the first instance maintain an action for his fees against the solicitor under the commission. At all events, neither the sheriff nor his officer can sustain a demand for poundage. But, perhaps, it will be unnecessary for the Court to decide these points, as the plaintiff, in order to answer the plea of *plene administravit*, merely proved the amount of the stamp upon the probate, and gave no evidence of assets having actually come to the defendant's hands.

ABBOTT C. J. That was presumptive evidence which might have been rebutted, but in the absence of any answer I think it was sufficient. And upon the whole I am of opinion, that we ought not to grant a rule for a new trial in this case. I perfectly agree with what has been stated to shew that the sheriff cannot maintain an action for fees beyond those which are given by statute. Here, the bailiff could claim no fee beyond the 4*d.* allowed by the 23 *H. 6.* against the party arrested, but the prohibition extends to him only. This question is therefore open, whether, if an officer be specially employed to make an arrest, it may not be presumed that the party so employing him, gives him to understand that he will pay such sum as the Court upon the taxation of costs is in the habit of allowing. I think that such an understanding may very fairly be presumed.

(a) 2 *M. & S.* 438.

Then

Then of whom is the officer to receive this sum? Undoubtedly he may claim it from the attorney by whom he is employed, and is not bound to look to the party in the cause of whom he knows nothing. The very circumstance that an account was kept in this case, and from time to time rendered to the testator, is abundant evidence to shew that he was the party understood to be primarily liable.

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against
BLAKELOCK.

BAYLEY J. Where a party leaves it to the sheriff to execute a writ by his own officer nominated by himself, the question is very different from that which exists in the present case. Here the attorney has selected an officer, and perhaps cast a burthen upon him which otherwise might have fallen upon another. As far back as living memory goes, an officer has always received a fee wherever he is employed to execute a writ at the instance of a plaintiff or his attorney, and that being so, the presumption in this case must be, that the attorney employed the plaintiff upon an undertaking to pay what was usual in such cases. The claim of poundage might not have been tenable, had any objection been made to it in the first instance, but as the testator saw the account wherein it is inserted and made no objection, we must presume that the officer accounted to the sheriff for it, and that the attorney was to reimburse him. I therefore agree that the verdict ought not to be disturbed.

HOLROYD J. concurred.

Rule refused. (a)

(a) *Littledale J.* had gone to chambers.

1826.

Monday,
April 17th.

HALL *against* BURGESS.

Tenant from year to year, at a rent payable half yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year. Before the next half year expired, the landlord let the premises to another tenant, who occupied the same : Held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant.

ASSUMPSIT for use and occupation of a set of chambers in *Clifford's Inn*. Plea, the general issue. At the trial before *Abbott C. J.*, at the *Westminster* sittings after last term, it appeared, that the defendant had been tenant to the plaintiff of the premises from year to year, at a rent payable half yearly. At *Michaelmas* 1824, that being the expiration of the current year, the defendant, without giving any previous notice, quitted the chambers and sent the key to the landlord's agent, who at first refused to take possession, but before the expiration of the next half year, without any express communication with either party, he let the premises to another tenant, who entered and took possession thereof; and this action was commenced to recover rent from *Michaelmas* 1824, up to the time when the chambers were let to the new tenant. The Lord Chief Justice left the case to the jury with a direction in favour of the defendant, for whom they accordingly found a verdict.

Denman now moved for a new trial, and contended, that as the defendant had not given a notice to quit, he remained liable to the landlord for rent afterwards accruing, and that the landlord was not barred of his right to recover against the defendant for the period during which the chambers were unoccupied, by having afterwards, during the half year, let them to another person, inasmuch as the defendant had before that letting expressly refused to occupy any longer.

BAYLEY

BAYLEY J. A landlord suing for rent must proceed either upon an express contract made with his tenant, or upon a contract which the law will imply from the relation subsisting between them. Here there was an express contract for rent payable half yearly, none therefore would be due until the expiration of half a year from *Michaelmas* 1824. As the landlord had not received any notice of the tenant's intention to quit at that time, he had a right to consider him as his tenant for another year. But by letting the premises to another person, the landlord shewed that he did not choose to consider the defendant as his tenant any longer, and as no rent was at that time due, he must be considered as having abandoned any claim which he might otherwise have acquired in respect of the time which had elapsed between *Michaelmas* 1824 and the subsequent letting of the chambers.

1826.

HALL
against
BURGES.

HOLROYD J. Before the 11 G. 2. c. 19., the landlord's remedy by action for his rent must have been upon the demise, and he could only recover according to it. The tenant's endeavour to give up the premises in this case was unavailing, and the possession was not altered until the subsequent letting by the landlord. That letting was therefore an eviction of the tenant, and had this action for rent been brought upon the demise, the defendant might have pleaded the eviction as a bar. The statute 11 G. 2. c. 19. gave to landlords the action for use and occupation, in order to avoid the difficulties of suing upon a demise, but it never was intended that the new action should be maintainable where the former was not.

LITTLE-

1826.

~~WENTWORTH~~
 HALL
 against
 BURGESS.

LITTLEDALE J. Under the contract between these parties, the rent was payable half yearly for a half year's occupation. That was an entire contract, and could not be apportioned without the assent of both parties. Had this declaration been framed specially according to the terms of the contract, it must have contained an averment that the plaintiff allowed, or was willing to allow, the defendant to occupy during the half year, but that averment would have been negatived by the letting to a third person before the expiration of that period. I am therefore of opinion, that the verdict was rightly found for the defendant.

Rule refused.

Tuesday,
 April 18th.

The KING *against* BOLTZ.

Where a defendant, convicted upon an indictment for a libel, was committed to prison at the instance of the prosecutor, who would not afterwards bring him up for judgment, the Court, at the prayer of the defendant, passed judgment in his absence.

THE defendant having been tried at the *Norfolk* Spring assizes before *Abbott C. J.* and found guilty of publishing a libel, was apprehended and committed to prison under a warrant granted by the Lord Chief Justice. Upon an affidavit stating these circumstances, and that the defendant was unable to procure bail, and that he believed the prosecutor did not intend to bring him up for judgment, but to suffer him to remain in prison, a rule nisi was granted calling upon the prosecutor to shew cause why judgment should not be pronounced upon the defendant in his absence, unless the prosecutor would undertake to bring him up for judgment during the term. After hearing *Storks* against the rule, and *F. Kelly* in support of it, the Court made it absolute, and judgment was afterwards passed upon the defendant in his absence.

1826.

DOE, on the demise of Wood and Another,
against TEAGE and Others.

Tuesday,
 April 18th.

THIS was an ejectment brought to recover the possession of lands and premises in the parish of *Stoke Fleming*, in the county of *Devon*. At the trial before *Burrough J.* at the last Spring assizes for that county, it appeared that the lessor of the plaintiff claimed the premises in question in right of his wife as the heir at law of *Dixon Nicholas Laud*. The defendants claimed under his will, and the question was, whether at the time of making that will the testator was sane or not. The testator by that will appointed *W. L. Hockin* his executor, who at the time of the death of the testator was indebted to him. Upon his being called as a witness in support of the will, it was objected, on the part of the plaintiff, that the executor was not a competent witness, inasmuch as the testator by appointing him executor had released the debt, and therefore that he had an interest in supporting the will; for if the verdict were found against the sanity of the testator, it would destroy the will altogether. The statute 25 G. 2. c. 6. where legatees attest the will, avoids the legacy and makes them competent witnesses. This was not a case within that statute, because *Hockins* was not an attesting witness; but that statute shews clearly that at common law a legatee would not be a competent witness, on the ground of interest. The learned Judge overruled the objection, and the jury found a verdict for the defendants.

Where, in ejectment against a devisee, the question turned upon the sanity of the testator at the time of making the will: Held, that an executor, who took a pecuniary interest under the will, was a competent witness to support it.

Wilde

1826.

Doc dem.
Wood
against
TRAGR.

Wilde Serjt. now moved for a new trial, on the ground that the testimony of the executor had been improperly admitted.

Per Curiam. The verdict in this case would only have the effect of establishing the will as to the real property. It would not be any evidence in the ecclesiastical court upon a question whether it were a good will as to the personalty; nor would the probate granted to the executor have been any evidence in this cause of the sanity of the testator. In any proceeding to establish the will as to the personalty, this suit would be treated as *res inter alios acta*.

Rule refused.

DEAN *against* BROWN and Others.

A woman before her marriage carried on trade, and being lame, kept a horse and gig for the purpose of going round to her customers. In contemplation of marriage, she, by deed, conveyed to a trustee all her household furniture, goods, and chattels, enumerated in a schedule, and the stock in trade, materials and other articles then belonging to her *in and about her said business*. The horse and gig were not included in the schedule, but after her marriage were used by her as before. In an action against the sheriff for taking the horse and gig under an execution against the husband, the jury found, that at the time when the deed was executed, the horse and gig belonged to the woman "in and about her business:" Held, that it was the property of the trustee.

TRESPASS against the defendants for seizing under a fi. fa. against *W. Hall*, a horse and gig alleged to be the property of the plaintiff, as trustee for *M. A. Hall*, the wife of *W. Hall*. Plea, not guilty. At the trial before *Abbott C. J.* at the *London* sittings after *Trinity* term 1825, it appeared that before the marriage of *W. H.* with *M. A. H.* the latter carried on the business of a feather and flower maker; and, being lame, kept the horse and gig in question for the purpose of going round to her customers to receive orders and carry home goods. In contemplation of the marriage, she

executed

executed a deed conveying to the plaintiff, as trustee for her, "all and singular the several articles of household furniture, plate, linen goods, chattels, and effects particularly specified and enumerated in a schedule indorsed on the deed. And also the stock in trade, materials, and other articles then belonging to the said *M. A. in and about her said business*." The horse and gig were not included in the schedule, but, after the marriage, were used by Mrs. *Hall* as before, and occasionally by her husband also. For the defendants it was contended; that as the property in question was not inserted in the schedule it could not pass by the words "goods, chattels, and effects;" and that it could not be considered as stock in trade. The Lord Chief Justice left it to the jury to say, whether at the time when the deed was executed the horse and gig belonged to *M. A. Tyler* "in and about her business." They found that it did, and thereupon a verdict was entered for the plaintiff; and in *Michaelmas* term a rule nisi for entering a nonsuit was granted.

Scarlett and *Comyn* shewed cause, and contended that the question was entirely one of fact, and was properly left to the jury. That the deed conveyed to the plaintiff every thing that belonged to *M. A. Tyler* in and about her business; and that as the jury found that the property in question did so belong to her, the plaintiff was entitled to retain the verdict which had been found for him.

Gurney and *Holt*, contra, contended that the question depended upon the construction of the deed. That it could not pass under the first class of property men-

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 DEAN
against
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tioned, because it was not included in the schedule; and that it could not pass under the second, not being stock in trade. The variable nature of stock in trade renders a schedule of it useless; and that is the reason for not adding one. The words "materials and other articles" following "stock in trade," must, therefore, mean articles *ejusdem generis*; but the property in question was of a permanent nature, and ought to have been mentioned in the schedule, if it had been intended to convey it to the trustee.

Per Curiam. The settlement included all things "belonging to *M. A. Tyler* in and about her business;" and the jury have found that the property in question did so belong to her. It is true that such things are not peculiar to that business; but if kept really and bona fide for the purposes of the trade, and not for pleasure, they would pass by the deed. The jury have in effect found that the horse and gig were kept for the trade, and not for pleasure; and it does not appear that there was any other property to satisfy the words "other articles," which follow "stock in trade," in the deed. The rule for a nonsuit must therefore be discharged.

Rule discharged.

1826.

EDWARDS *against* LUCAS and Another.Saturday,
April 22d.

CASE against defendants, late sheriffs of *London*, for a false return to a testatum *fi. fa.* issued against the goods of one *J. B.*, on a judgment recovered against him by the plaintiff. Plea, the general issue. The declaration in setting out that judgment stated, "that by the consideration and judgment of the Court he recovered against *J. B.* 39*l.* 10*s.*, which were adjudged to him for his damages, by him sustained, as well by occasion of the not performing certain *promises and undertakings*, before then made by *J. B.* to plaintiff, as for his costs, &c. prout patet," &c. At the trial before *Abbott C. J.*, at the *London* sittings after last *Trinity* term, the record of the former judgment being produced in evidence, it appeared that as to all the counts in the declaration except the first, a remittitur was entered, and that the damages were given for the non-performance of the *promise and undertaking* in that count mentioned. The counsel for the defendants thereupon objected that there was a fatal variance between the judgment set out in the declaration and that produced in evidence, and *Baynes v. Forrest* (a) was cited. The Lord Chief Justice reserved the point, and the plaintiff having obtained a verdict, a rule nisi for entering a nonsuit was granted in *Michaelmas* term; and now

In case against the sheriff for a false return to a *fi. fa.*, the declaration stated, that by the judgment of the Court, the plaintiff recovered against *A. B.* 39*l.*, which were adjudged to him for his damages by him sustained, as well by occasion of his not performing certain *promises and undertakings*, as for his costs, &c. At the trial, it appeared by the judgment produced in evidence, that as to all the counts in the declaration, except the first, a remittitur was entered, and that the damages were given for the non-performance of the promise and undertaking in that count mentioned: Held, that this was a fatal variance.

Hutchinson shewed cause. The objection upon which

(a) 2 Str. 892.

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against
LUCAS.

this rule was granted depends upon the decision in *Baynes v. Forrest*. But that case is distinguishable from the present in two particulars. That was a proceeding by sci. fa., upon a judgment which was alleged to be for damages by reason of the non-performance of a certain promise and undertaking; the judgment was for non-performance of several promises. In that case, therefore, the allegation was not proved, for the damages could not be severed. There, too, the former judgment was the foundation of the proceeding; here, it was only inducement, and the proof supported the allegation, that a judgment for a certain sum was recovered, and that sufficed, *Hamborough v. Wilkie* (a). It makes no difference in such a case that the record is pleaded with a prout patet, *Stoddart v. Palmer*. (b)

Gurney and *Chitty* contra, were stopped by the Court.

ABBOTT C. J. I am of opinion that the rule for entering a nonsuit in this case must be made absolute. The former judgment was an essential part of the plaintiff's ground of action. He was bound to set out a judgment warranting the writ of fi. fa., and, in so doing, he alleged that judgment to be for damages for the non-performance of several promises, whereas the judgment produced appeared to be for the non-performance of one promise. It is certainly immaterial, as far as these defendants were concerned, whether the judgment was for the breach of one or several promises, but it was material that the plaintiff should state that judgment

(a) 4 M. & S. 474.

(b) 3 B. & C. 2.

correctly.

correctly. If this declaration were held sufficient, it might be urged with some force, that a judgment alleged to be in assumpsit would be satisfied by proof of a judgment in tort or in debt. It, therefore, appears to be the safer course to hold that the variance is fatal.

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against
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Rule absolute.

GREGORY *against* HURRILL.

Saturday,
April 22d.

THE following case was sent by the Lord Chancellor for the opinion of this Court:

In the year 1811 one *R. L. Hipkins* (since deceased) and *G. B. Gregory* having entered into a commercial speculation or adventure, in shipping goods on board the ship *Irvine*, bound on a voyage to the coast of *Barbary*, a partnership agreement was drawn up, and signed by both parties. On entering into that agreement, *R. L. Hipkins* and his wife transferred 3000*l.* bank annuities into the name of *Benjamin Walsh*, a broker, to answer the purposes of the speculation, who thereupon agreed to become the agent of the concern upon the

In December 1811, *G.*, then abroad, being indebted in the sum of 1000*l.* to the estate of *W.*, a bankrupt, the assignees of *W.* issued against him writs of special ca. alias and pluries, in Mich. term 1812, and Hil. term 1813, which were delivered to the sheriffs of London, and by them duly indorsed, non est invent., but

the writs remained in the sheriff's office. In 1814, *G.* being on board a ship in the *Downs* waiting for a fair wind, went several times to Deal, but *W.*'s assignees had not notice of his being there. In 1819 *G.* returned to reside in England. In 1821, the debt of 1000*l.* being still unpaid, the assignees of *W.* struck a docket against *G.*, and upon their petition a commission issued against him, and on the 21st March in that year he was declared a bankrupt. *G.* petitioned to have the commission superseded, and by an order of the Vice-Chancellor, made May 1821, it was ordered that *G.* should be at liberty to bring trover against his assignee to try the validity of the commission; which action he accordingly commenced 19th May 1821. Two days afterwards the attorney for the petitioning creditors took away the writs of spl. ca., alias and pluries, from the sheriff's office; and on the 11th of July 1821, the last day of Trinity term, a roll of the proceedings, with the continuances on the writ of pluries brought down to the term next preceding the date of the commission issued against *G.*, was docketed and carried in, and on the same day the three writs were filed of record. Upon a case stating these facts: Held, that the assignees of *W.* had not, at the time of suing out the commission, awarded and issued against *G.*, or on the 21st of March 1821, when he was declared a bankrupt, a valid debt as petitioning creditors to support the commission.

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usual terms of interest, and a commission of $2\frac{1}{2}$ per cent. being allowed upon the amount of all advances and payments made by him in the course of such agency, and that the proceeds of the cargo were to be remitted to *Walsh* for the payment of such advances. Various goods were purchased, and the different merchants and tradesmen were referred to *B. Walsh*, who either paid in cash, or accepted bills of exchange for the amount. The goods were shipped on board the ship *Irvine*, bound to *Algiers*. The said *G. B. Gregory* soon afterwards sailed with the said cargo for *Algiers* in the *Irvine*. *B. Walsh* continued to pay the bills so accepted by him on account of the goods so shipped on board the *Irvine* down to the month of *December* in the said year 1811, when he became a bankrupt, at which time there was a balance exceeding 1000*l.* due from *Gregory* and *Hipkins* to *B. Walsh* on account of such adventure, and which balance has not at any time since been reduced. On the 24th of *June* 1812, while *Gregory* was abroad, *J. T. Taylor* and *J. Parker*, as assignees of *B. Walsh*, commenced an action by special original in his majesty's Court of King's Bench against *Hipkins* and *Gregory* for the recovery of a debt then claimed to be due and owing from *Hipkins* and *Gregory* to the estate of *B. Walsh*, and for that purpose sued out a writ of special *capias*, directed to the sheriffs of *London*, returnable on the morrow of *All Souls* in *Michaelmas* term in the aforesaid year 1812, and indorsed for bail for the sum of 1000*l.* and upwards. The said *R. L. Hipkins* being at the time of suing out the said writ a prisoner in the King's Bench prison, was detained in custody at the suit of the said assignees of *B. Walsh* for the aforesaid debt of 1000*l.* A commission of bankrupt was on or about the

18th of *August* 1812, upon the petition of the said *J. T. Taylor* and his then copartner *J. Taylor*, awarded and issued against *R. L. Hipkins* as the copartner in trade of *Gregory*, and under which commission he, *Hipkins*, was duly adjudged a bankrupt. At a meeting under the commission, held at Guildhall, *London*, on the 5th of *September* 1812, the said *J. T. Taylor* was duly chosen sole assignee of the estate and effects of *Hipkins*, and an assignment of such estate and effects was executed to *J. T. Taylor* by the major part of the commissioners in the commission named. *Hipkins* died in *September* 1813. In *November* 1812, *Gregory* being then abroad, an alias writ of special *capias* was sued out against *Hipkins* and *Gregory*, at the suit of the assignees of *B. Walsh*, directed to the sheriffs of *London*, returnable in fifteen days of *St. Martin*, in *Michaelmas* term 1812; and on the 11th day of the following month of *December* 1812, a pluries writ of special *capias* was sued out by the assignees of *Walsh* against *Hipkins* and *Gregory*, also directed to the sheriffs of *London*, and returnable in eight days of *St. Hilary*, in *Hilary* term in the following year, 1813; and both the said last-mentioned writs were also indorsed for bail for 1000*l*. All the said writs of *capias* alias and pluries were lodged at the secondaries or sheriff's office for *London*, in and between the beginning of *Michaelmas* term 1812 and the end of *Hilary* term 1813, and were severally duly returned non inventi by the then sheriffs, before the end of *Hilary* term 1813. The said action was so commenced by special original in the Court of King's Bench, and such several writs of *capias* alias and pluries sued out thereon, with a view to outlaw the said *G. B. Gregory*, but no outlawry ever took place, the

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completion of such intended outlawry having been subsequently suspended by reason of the commission of bankrupt having been so awarded and issued against *Hipkins*, as before mentioned. At the trial of the action hereinafter mentioned such evidence of the return of *Gregory* to *England* in the month of *April* 1814, was given as is hereinafter also mentioned. *Gregory* afterwards returned to *England* in *July* 1819. The assignees of *Walsh*, on the 15th day of *February* 1821, commenced a new action in the Court of King's Bench against *Gregory* as the surviving partner of *Hipkins*, and sued out a bill of *Middlesex* against *Gregory*, returnable on *Wednesday* next, after fifteen days of *Easter*, in *Easter* term in the aforesaid year, 1821; and which bill of *Middlesex* was indorsed for bail for 1336*l.* 6*s.* 10*d.*, being the same identical debt, with an accumulation of interest thereon, as that for which the former action was brought against *Hipkins* and *Gregory* jointly. A warrant on the said bill of *Middlesex* was made out and delivered to an officer of the sheriff of *Middlesex* for the purpose of executing the same, and that such officer went with it to the house or residence of the said *Gregory*, in order to arrest him, and made several attempts to effect it, which having failed, the assignees of *Walsh* (the plaintiffs in that action), on the 17th of *March* 1821 proceeded to strike a docket, and on the 22d day of the same month of *March* 1821, issued a commission of bankrupt against *Gregory*, and he was thereupon adjudged and declared a bankrupt. *Aaron Hurryll Esq.* was duly chosen sole assignee of the estate and effects of *Gregory*, at the second meeting of the commissioners held at *Guildhall*, on the 21st of *April* 1821. *Gregory* having

having opposed the said commission, on the 12th of *April* 1821, preferred his petition to the Lord Chancellor, thereby praying that the same might be superseded.

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By an order of the Vice-Chancellor made on hearing the said petition on the 9th of *May* 1821, it was ordered, that the said *G. B. Gregory* should be at liberty to bring and prosecute an action of trover against the assignee of his estate and effects, who on the trial was to admit possession of goods to the value of *5l.*, in order to sustain the said action, and the petitioning creditors under the said commission were to defend the action in the name of the assignee, upon their indemnifying the assignee, and the same was to be tried in his majesty's Court of Common Pleas in *London*; and it was ordered, that all proceedings under the said commission should be stayed until further order. *Gregory*, in pursuance of and in obedience to the order, did, on the 17th *May* 1821, commence an action of trover against *Hurrill*, his assignee, in his majesty's Court of Common Pleas accordingly. On the 19th of *May* 1821, two days after the commencement of the action of trover to try the validity of the said commission, the attornies for the petitioning creditors under the commission so issued against *Gregory*, fetched away from the secondaries or sheriffs' office for *London* the said three several writs of *capias*, alias, and *pluries* so issued out against *Hipkins* and *Gregory* in the year 1812 as aforesaid, with the returns so as aforesaid indorsed on the said three writs. The said three writs were all filed together in the record office of the Court of King's Bench, on the 11th of *July* in the aforesaid year, 1821, being the last day of *Trinity* term
in

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in that year, and a roll of the proceedings, with the continuances on the writ of pluries brought down to the term next preceding the date of the commission so issued against *Gregory*, was docketed and carried in, and on the same day the said three writs were so filed of record, which, in point of fact, was the day next before the day appointed for the trial of the action of trover, and only two days before such trial actually took place. The action of trover came on for trial before the Lord Chief Justice of the Court of Common Pleas and a special jury, at *Guildhall*, on the 13th day of *July* 1821, when the said *J. T. Taylor* and *J. Parker*, as such petitioning creditors as aforesaid, proved the trading and act of bankruptcy of *Gregory*; and when they also, by the production of certain documents and the testimony of *Walsh*, established a debt of 1477*l.* 11*s.* 6*d.*, due to them as such assignees as aforesaid, for and on account of the several advances so as aforesaid made by *Walsh*. Whereupon *Gregory* adduced as evidence *S. Hatch*, the clerk of Mr. *Iggulden*, the vice-consul of *Sweden*, resident at *Deal*, who identified *Gregory* as being a person, who, in the month of *April* 1814, had called at the office of the said vice-consul at *Deal* several times, whilst waiting for a passage in the ship *Hazard*. He left a letter with the witness to be delivered to the captain of a ship called the *Aurora*, and *Gregory* waited there several days, which letter was given in evidence at the trial, and is as follows, viz. “*Downs*, 21st *April* 1814. Captain *M. F. Böhl*. You will proceed from hence with all dispatch for the port of *Amsterdam* with your cargo, waiting my further orders in regard of the same. Your obedient servant, *G. B. Gregory*. P.S. As all privateers are called

called in, there is no occasion for convoy." Addressed, "Captain *M. F. Bohl*, Swedish schooner *Aurora*, care of *E. Iggulden*, Esq. *Deal* (expected in the *Downs* hourly from *Portsmouth*.)" The testimony of the said *S. Hatch* was the only evidence offered by the said bankrupt of his having been in *England* from the year 1811 till the year 1819; whereupon *Taylor* and *Parker*, the assignees of *Walsh*, produced one *Martha Salter* as a witness, who stated that she knew the said *G. B. Gregory* in *Sweden* in 1815, and that she had seen him in *England* at the house of *Mr. Patrick*, in the year 1819, when he said that he had sailed from *England* in the year 1811; and returned in 1819; and that she had also heard him say, in the presence of his sisters, that he had never been in *England* during the whole seven years, and that she thought she had heard him say so more than once. And the assignees of *Walsh* also produced, and put in evidence at the said trial, examined office copies of the aforesaid writs of *capias*, *alias*, and *pluries*, and returns indorsed thereon, and also an examined office copy of the roll of the proceedings, with the continuances so entered thereon. The Lord Chief Justice thereupon directed the jury to find a verdict for the plaintiff, *Gregory*, reserving the point for the consideration of the Court of Common Pleas as to the effect of the continuances so as aforesaid entered on the roll, and whether the same were sufficient to take the case out of the statute of limitations. (The cases of *Taylor v. Hipkins* (a), *Gregory v. Hurrill* (b), and *Gregory v. Hurrill* (c) were then briefly stated.)

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 GREGORY
 against
 HURRILL.

(a) 5 B. & A. 489.

(b) 3 B. & B. 212.

(c) 1 Bing. 324.

On

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against
HUNT.

On the 8th of *July* 1823, *Gregory* preferred another petition to the Lord Chancellor, thereby stating that, notwithstanding the opinion of the Judges of the Court of Common Pleas, he was advised that the debt of the petitioning creditors (if any) was really and actually barred by the statute of limitations, and was not a valid debt at the time of issuing the said commission against him to support such commission. Upon the hearing of the last-mentioned petition, his Lordship was pleased to order that a case should be stated for the opinion of his majesty's Court of King's Bench upon the following question, "Whether under the circumstances stated, the said *J. T. Taylor* and *J. Parker* as assignees of the estate and effects of *Walsh*, who were the petitioning creditors under the commission of bankrupt awarded and issued against *Gregory*, had at the time of suing out the said commission of bankrupt, viz. on the 22d day of *March* 1821, and on the 9th day of *April* 1821, when *Gregory* was declared a bankrupt, a valid debt as petitioning creditors, to support the said commission as well upon any trial to be had at law, as upon any criminal proceeding by information or indictment that might have been preferred against the said bankrupt under the statute of the 5 G. 2. c. 80. s. 1. relating to offences therein charged against bankrupts (if any such had been necessary), regard being had in both cases to the time, viz. the 11th day of *July* 1821, when the entry of the continuances on the roll was made; and in the latter case, considering that such criminal proceeding had been commenced at any time after the adjudication of the said bankruptcy, but before the entry of the said continuances on the roll."

Campbell

Campbell for the plaintiff. There was not any good petitioning creditor's debt in this case at the time of the suing out of the commission or the adjudication of bankruptcy. The debt claimed was barred by the statute of limitations, and such a debt is insufficient. According to *Swayne v. Wallinger* (a) and *Quantock v. England* (b) a third person cannot raise such an objection where the bankrupt has submitted to the commission; but here the bankrupt makes the objection, and where such a debt has been proved, the Lord Chancellor has ordered the proof to be expunged, ex parte *Dewdney* (c), ex parte *Roffey* (d). But it will be said that this debt was within the exception as to merchants' accounts. That is not so; it was a mere debt. There were no mutual dealings, and the exception in the statute applies only where there are dealings on each side, *Barbor v. Barbor* (e), *Foster v. Hodgson* (f), *Catling v. Skoulding* (g). Then, was the plaintiff abroad until within six years of the commencement of the suit against him in 1821? The statute of 21 Jac. 1. c. 16. applies only to the absence of the creditor, the saving on account of the absence of the debtor depends upon the 4 Anne, c. 16. s. 19., which makes the same exception in favor of plaintiffs when the defendant is abroad, as the 21 Jac. 1. had done in case of the plaintiff's absence. But *Gregory* returned to *England*, and was at *Deal* for several days in 1814. It makes no difference that *Walsh's* assignees did not know of his return, for the statute does not require such knowledge in the creditor in order to make the time begin to run.

1826.

 GREGORY
 against
 HURBELL.

(a) 2 Str. 746.

(c) 15 Ves. 479.

(e) 18 Ves. 286.

(g) 6 T. R. 189.

(b) 5 Burr. 2628.

(d) 2 Ross B. C. 245.

(f) 19 Ves. 179.

If

1826.

Gregory
against
Hemall.

If *Gregory* had remained in *England*, the six years would have been computed from the first day of his return. It is clear, therefore, that the time then began to run, and would continue to do so although he again went abroad, *Smith v. Hill* (a), *Doe v. Jones* (b). The exception in the 4 *Anne*, c. 16. will not, therefore, aid the present defendant, and his case must rest upon the effect of the writs which were sued out in 1812-13, and then indorsed by the sheriff non est inventus, but which were not returned and filed until after the commission issued. The roll was not carried in and continuances entered until two days before the trial in the Court of C. P. In the first place it may be doubted whether a commission of bankrupt can be considered as a continuance of a capias, *Smith v. Bower* (c). But, waiving that objection, if a writ is sued out and returned, that indeed will avoid the statute; but if the writ be not returned, it has no such effect, *Brown v. Babbington* (d). The Court is not in possession of the suit until the writ is returned, *Harris q. t. v. Woolford* (e). Now the return of the writ is the return to the treasury of the Court, not the mere indorsement by the sheriff, as appears by the rule of court, T. 30. G. 3. which requires the custos breviarum to indorse upon every writ on what day and at what hour the same was filed. And in *Bates v. Jenkinson* (f), *Buller J.* says, "If the first writ had been sued out, and kept in the plaintiff's pocket, there would have been great objection (i. e. to treating it as the commencement of a suit so as to avoid the statute of limitations), but

(a) 1 *Wils.* 134.(b) 4 *T. R.* 300.(c) 5 *T. R.* 962.(d) 2 *Ld. Raym.* 880.(e) 6 *T. R.* 617.(f) Cited by Lord *Knyon* in *Harris v. Woolford*.

not any when returned of record, *and not merely indorsed by the sheriff.*" *Stanway v. Perry* (a), and *Weston v. Fournier* (b), are to the same effect, and in *Beardmore v. Rattenbury* (c), the fact of the first writ having been returned, was relied upon to shew that it was a good commencement of the action. At all events the adjudication of bankruptcy in this case was wrong, for at the time when the docket was struck, and the commission issued, the writs had not been filed, nor the continuances entered. The petitioning creditor, therefore, had not at that time perfected his title at law, and was not in a condition to shew that *Gregory* was indebted to him. Suppose the bankrupt in such a case were not to surrender within the time limited, if he were originally improperly adjudged to be a bankrupt, that would be an answer to an indictment under the 5 G. 2. c. 90. *Rex v. Bullock* (d): but if the subsequent return of the writs and entry of continuances could revive the debt and make the commission good, he might by matter ex post facto be made guilty of a capital offence. Besides this, to make him so or not would be in the option of the sheriff, who cannot be *compelled* to return a writ unless he is called upon to do so within six months after he quits his office. Suppose a prosecution to have been commenced before the entry of the continuances, in that state of things it must fail; could it then be made available or not by the subsequent entry of them? Lastly, to allow the continuances in this case, entered after the issuing of the commission, to suffice for the support of the commission, would be to allow the fiction of law to prevail against

1826.

 GREGORY
 against
 HURRILL.

(a) 2 B. & P. 157.

(b) 14 East, 491.

(c) 5 B. & A. 452.

(d) 1 Taunt. 71.

the

1826.

 GREGORY
 against
 HURMILL.

the truth of the fact, in a case where that is material, which would be contrary to the decisions in *Johnson v. Smith* (a), and *Lytleton v. Cross* (b).

Denman, contra. This commission was good for all purposes; and even if that were not so it might be good for the purpose of distributing the bankrupt's estate. In the first place, the debt to *Walsh's* assignees arose out of merchants' accounts. *Walsh* was clearly the factor of *Gregory* and *Hipkins*. Now, whatever dicta may have been thrown out, the statute itself says nothing about mutual accounts; and the language of Lord *Kenyon*, in *Callling v. Skoulding*, shews that, in order to take a case out of the operation of the statute, it is not necessary that any item of the account should have arisen within six years. [*Bayley J.* In that case there were mutual items, and that is noticed by Lord *Kenyon*.] Secondly, the debtor was beyond seas. It is not stated as a fact that he returned in 1814, but conflicting evidence as to that fact is set out; the Court therefore are, as to that, placed in the situation of a jury, and must determine whether *Gregory* did return at that time. But supposing him to have come to *Deal* at the time and in the manner described, still it was not such a return as is contemplated by the 4 *Anne*, c. 16. It does not appear that there was any animus revertendi; but, coming into the *Downs* by accident, he went on shore for the purpose of leaving a letter with the *Swedish* consul. Suppose a person, upon whom a right of entry descends during his absence from *England*, to be stranded on the coast, he knows nothing of this

(a) 2 *Burr.* 950.(b) 3 *B. & C.* 317.

right,

right, and afterwards continues his voyage, and remains abroad more than twenty years, it would be very hard to say that his right was barred by the statute of limitations; yet that consequence must follow if *Walsh's* assignees are barred in this case. Thirdly, the writs issued in 1812, and 1813, were duly returned: it is so stated upon the face of this case, and the only question is, whether the continuances afterwards entered could set up the writs so as to take the claim out of the statute. It cannot be said that the action was not commenced and sued, when writs were actually issued and delivered to the sheriff, and returns indorsed by him, for although they might be inchoate returns only at the time when made, yet when delivered out of his office, they became perfect, and were returns from the time when the writs were returnable. This case has in effect received three determinations already; first, in this Court in *Taylor v. Hopkins* (a), where the Court held that the writs had been duly returned and filed so as to save the statute of limitations, and that the continuances were properly entered; again by the whole of the Court of C.P. in *Gregory v. Hurvill* (b), which was an action brought to try the validity of this commission, and in which *Richardson J.* gives an answer to the objection that a commission cannot be valid as a continuance of the former suit. He says, "As long as a remedy was open to the party, by which the debt might have been recovered any where, it was not barred by the statute." The point was again decided by three of the Judges of that Court in a case between the same parties, sent by the Lord Chancellor for the opinion of that Court, when they

1826.

 GREGORY
 against
 HURVILL.

(a) 5 B. & A. 489.

(b) 5 B. & B. 312.

1826.

Gregory
against
HARRIS.

held that the petitioning creditor had a good debt at the time of suing out the commission now disputed (a). If then the writs were duly returned and filed, and the continuances properly entered, the demand was not barred by the statute; it was, consequently, a good petitioning creditor's debt, and the commission is valid for all purposes. But if that were otherwise, still there are cases which shew that proceedings may be good for civil purposes, although not for criminal, *Bones v. Booth* (b), *Rex v. Punshon* (c), and therefore a commission of bankrupt may be good for the purposes of distributing the estate of the bankrupt, although not for rendering him liable to criminal proceedings.

Cur. adv. vult.

The following certificate was afterwards sent to the Lord Chancellor:

"This case has been argued before us by counsel, and we are of opinion, that, under the circumstances stated, the said *J. T. Taylor* and *J. Parker*, as assignees of the estate and effects of the said *Benjamin Walsh*, who are the petitioning creditors under the said commission of bankrupt awarded and issued against the said *G. B. Gregory*, had not at the time of suing out the said commission of bankrupt, viz. on the 22d day of *March* 1821, or on the 9th of *April* 1821, when the said *G. B. Gregory* was declared a bankrupt, a valid debt as petitioning creditors to support the said commission."

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

J. LITTLEDALE.

(a) 1 Bing. 324.

(b) 2 W. Bl. 1226.

(c) 3 Camp. 96.

1826.

BERKELEY *against* HARDY.Monday,
April 24th.

COVENANT upon an indenture of lease. Plea, non est factum. The cause, and all matters in difference between the parties, were referred to a barrister, who, by his award as to the action, found that it was brought upon certain indentures which were, on the 24th of July 1822, signed, sealed, and delivered by one J. S. for and on the behalf of the plaintiff, and by the said defendant respectively, the said J. S. having been theretofore authorized by the plaintiff, by writing under his hand, but not under seal, to execute the same for him, and on his behalf, the beginning of which said indentures was as follows: "Agreed the 24th of July 1822, between *James Simmonds*, for and on behalf of *W. F. Berkeley* (the plaintiff), on the one part, and *J. Hardy*, of the other part, as follows: the said *W. F. Berkeley* agrees to let, and the said *J. Hardy* agrees to take, all those messuages, tenements, farms, and lands," &c. The reddendum was to the plaintiff, and the covenants were expressed to be made by *Hardy* to *Berkeley*, and by *Berkeley* to *Hardy*, the name of *J. Simmonds* never occurring in the lease after the commencement above set out, until the conclusion, which was as follows: "In witness whereof we have hereunto set our hands and seals the day and year above written. *J. Simmonds* (L. s.) *J. Hardy* (L. s.)" The arbitrator then found that *J. Hardy* had committed certain breaches of covenant, and assessed the damages at 280/., and then proceeded: "But it having been objected on the

Where an indenture was made between "A. for and on behalf of B. on the one part, and C. on the other part." A. being thereto authorized by writing, under B.'s hand, but not under seal, and A. executed the deed in his own name: Held, that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B.

1826.

BERKELEY
against
HARDY.

part of the defendant, that the said *W. F. Berkeley* was not entitled in law to maintain any action of covenant in his own name upon the indentures; and it appearing to me that such objection to the form of the action is well founded, I do hereby order and adjudge that the said *W. F. Berkeley* is not entitled to recover his said damages in such action of covenant." The arbitrator then proceeded to dispose of other matters not material to this question. In *Hilary* term a rule nisi was obtained for setting aside the award, in as far as it determined that the said action of covenant was not maintainable.

Tindal and *Coleridge* now shewed cause. Upon the facts disclosed in the award, it is clear that the plaintiff could not maintain covenant on the deed in his own name. First, his agent *Simmonds* had not any sufficient authority to bind him by deed: the authority should have been under seal, not under hand only, *White v. Cuyler* (a), *Horsley v. Rush*, cited in *Harrison v. Jackson* (b), *Williams v. Walsby* (c), *Steiglitz v. Egginton* (d). Secondly, supposing the authority to have been sufficient, still the execution was improper: the attorney should have executed in the name of his principal, *Combe's case*, second resolution (e), *Frontin v. Small* (f), *Barford v. Stucky* (g). [*Littledale J.* The same appears from *Wilks v. Back* (h).] Thirdly, it is a general rule of law, that where a deed is made inter partes, no person can maintain an action upon the deed who is not a party to it. In *Scudamore*

(a) 6 T. R. 176.

(c) 4 Esp. 220.

(e) 9 Co. 76.

(g) 2 B. & B. 333.

(b) 7 T. R. 209.

(d) Holt, N. P. C. 141.

(f) 2 Ld. Raym. 1418.

(h) 2 East, 142.

v. Vandensene (a), it was held that one of two covenantees who had sealed the indenture, but was no party to it, could not release the covenantor; à fortiori he could not sue him. And in *Storer v. Gordon* (b), it was held that a deed inter partes could not operate as a release to strangers. This rule does not apply to deeds poll. Nor does it prevent a covenantor from being sued upon an indenture to which he is no party. But in a case where two joint covenantees sued upon an indenture executed by one of them only, it was held, indeed, that the action was maintainable, but for this reason, that the plaintiff who did not execute was nevertheless a party to the deed, and the covenantor had executed to him as well as to the co-plaintiff, *Clement v. Henley* (c). This case is very different: the plaintiff is a stranger to the deed, and therefore cannot sue upon it. *Salter v. Kidgely* (d) may be cited on the other side; but that case was the converse of the present, being an action by a party to the indenture against one who was no party, but had executed the deed; and that distinction was particularly pointed out by Holt C. J. *Gilby v. Copley* (e) was never decided at all; but the argument used in support of the action was, that the deed then in question was in the nature of a deed poll.

1826.

BERKELEY
against
HART.

Taunton and *Campbell* contra. It may be admitted, that where an attorney executes a deed for another, he must execute in the name of the principal. It may be

(a) 2 Inst. 673. 2 Roll. Abr. 22. *Faith*, (F) 1.

(b) 3 M. & S. 308.

(c) 2 Roll. Abr. 22. *Faith*, (F) 2.

(d) *Carth.* 76.

(e) 3 Lev. 138.

1826.

BRACKLEY
against
HARDY.

admitted also, that there is the distinction between deeds poll and inter partes, which has been pointed out. Still the plaintiff may support this action. The arbitrator appears to have proceeded upon the ground, that *Simmonds* was not properly authorised to execute the deed. In most cases, it is true that an attorney, in order to bind by deed, must have an authority by deed; but there is a difference between the cases where the principal parts with an interest, and where he gives a mere authority. In *Co. Litt. 52 b.* it is said, that an attorney to deliver seisin must be by deed; but in *Moyle v. Ewer* (a), where an indenture of bargain and sale between *J. S.* of the one part, and *J. D.* of the other part; and in the end thereof, a letter of attorney to *J. N.* to make livery was produced in Court, and it was urged that it should be void because the attorney was no party to the deed, the Court held it well enough. [*Abbott C. J.* Livery of seisin is a matter in pais.] So is the execution of a deed. It is clear, that, in order to bind by deed, a party need not in all cases be authorised by deed, for he may derive such an authority from a will. Then as to the third point, there is a material distinction between this case and those which have been cited. All the covenants are in words between the plaintiff and defendant. The name of *Simmonds* is merely introduced at the beginning and the end, and as he is no party to any of the covenants, the execution by him is a mere nullity, and the deed may be considered as a deed poll executed by *Hardy* alone. [*Holroyd J.* Then there is no demise to lay the foundation of the defendant's covenant.] [*Abbott C. J.* Treat the first clause of this indenture as an

(a) *Noy*, 49. *Cro. Eliz.* 905.

agreement between the plaintiff and defendant, can it be valid if the plaintiff did not execute it? The execution of a counterpart by a lessee may, as against him, be evidence of the execution of the original, but it is only evidence.] The Court may presume the deed before them to be in the nature of a counterpart, and that the original was properly executed by or for the plaintiff, and then all difficulty is avoided.

1826.

BERKELEY
against
HARDY.

ABBOTT C. J. I am not aware of any instance in which the Court, upon the production of an instrument insufficient to support an action founded upon it, has presumed the existence of another deed which would be sufficient. We are left, then, to decide upon those strict technical rules of law applicable to deeds under seal, which, I believe, are peculiar to the law of *England*. Those rules have been laid down and recognised in so many cases, that I think we are bound to say no action can be maintained by *W. F. Berkeley* upon the deed in question. The rule for setting aside the award must therefore be discharged.

HOLROYD (a) and LITLEDALE Js. concurred.

Rule discharged.

(a) Bayley J. was in the Bail Court.

1826.

Tuesday,
April 25th.CLAYTON *against* GOSLING.

Where a promissory note, payable with interest twelve months after notice, was expressed to be "for value received," and the maker became bankrupt before any notice was given: Held, that the payee might prove it under the commission.

ASSUMPSIT on a promissory note, in the following form: "*December 30, 1820.* On having twelve months' notice we jointly and separately promise to pay Mr. John Clayton, or order, 200*l.* for value received, with lawful interest. *G. Gosling, J. D. Bower.*" Pleas, the general issue and bankruptcy of defendant. At the trial before *Hullock B.*, at the *Derby Lent* assizes, 1825, a verdict was found for the plaintiff for the amount of the note, subject to the opinion of this Court upon the following case. The name of *G. Gosling* was proved to be the hand-writing of the defendant. In 1821 the defendant became bankrupt, and a commission was issued against him, bearing date the 25th of October in that year, and on the following day a notice was given to him by the plaintiff, to pay in twelve months the 200*l.* and interest secured by the note; and a similar notice had been given to *Joshua Dale Bower*, of *Chesterfield*, (the place where the plaintiff and defendant resided.) No evidence was given as to whose hand-writing the name, *J. D. Bower*, signed to the note, was; but it was proved that there was no person, either in *Chesterfield* or in the neighbourhood, answering the description of *J. D. Bower*, except the *Joshua Dale Bower* to whom notice was given. The defendant's certificate was dated the 29th of April 1824. The case was now argued by

N. R. Clarke for the plaintiff. The debt now sought to be recovered was not proveable under the commission
issued

issued against the defendant, and, consequently, is not barred by his certificate. The plea is, that the cause of action arose before the bankruptcy, *Charlton v. King* (a); but no action could at that time have been maintained upon the note. The defendant had been guilty of no default; the debt was not payable, at all events, for it depended upon the contingency of notice being given by the plaintiff: that such debts cannot be proved, has been long decided; *Hancock v. Entwisle* (b), *Utterson v. Vernon* (c). Nor is the note to be considered as conclusive evidence of debitum in presenti. Neither is the case within the principle of the 7 G. 1. c. 31.; that was intended to apply to cases relating to trade, and to allow the proof of bills payable at some specified day. The provision as to the rebate of interest makes that quite apparent.

1826.

 CLAYTON,
 against
 GOSLING.

S. M. Philipps contra. The question in this case turns upon the 7 G. 1. c. 31., and that statute made the debt proveable. It was debitum in presenti. The note is expressed to be "for value received." It was not a debt upon contingency, within the meaning of the cases cited. In them, either the amount of the debt was not ascertained, or the time of payment was uncertain, and did not depend upon the will of the creditor. Here the amount to be paid was ascertained, and the creditor, by giving notice, might at any time fix the day of payment.

ABBOTT C. J. We have decided, on more than one occasion, that the expression "value received," in a note, imports, "received from the payee." The note

(a) 4 T. R. 156.

(b) 3 T. R. 435.

(c) 4 T. R. 570.

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CLAYTON
against
GOSLING.

in question may, therefore, be read thus: "We acknowledge to owe the payee 200*l.*, and promise to pay him that sum, with interest, twelve months after notice." If so, there is not any contingency as to the debt, for that is admitted to be due. Nor is the time of payment contingent, in the strict sense of the expression; for that means a time which may or may not arrive: this note was made payable at a time which we must suppose would arrive. But no notice was given, and therefore no action could be maintainable at law at the time of the bankruptcy. The statute 7 G. 1. c. 31. was made to remedy such evils, and provides for the proof of debts payable in futuro, and provides also for a rebate of interest. Can, then, such rebate be made here? I think it may. The interest will cease, and then the effect will be the same as if the note had been payable at a certain period after date. The case, then, being free from the difficulties which might have occurred as to the rebate, had the note been payable without interest, I think it was proveable, and, consequently, that the plaintiff's demand was barred by the certificate.

BAYLEY J. Where it is matter of contingency whether the debt will ever be payable, or where the amount of it is uncertain, it cannot be proved. But here the note is expressed to be for value received, which, according to *Highmore v. Primrose* (a), is an acknowledgment of a debt due. The twelve months after notice merely applies to the time of payment, and the 7 G. 1. c. 31. is founded upon the distinction between debts not due and not payable. If interest had not been payable from

(a) 5 M. & S. 65. See also *Friddey v. Henbrey*, 1 B. & C. 674.

the date but from the notice, then, as notice had not been given at the time of the bankruptcy, the amount of the sum to be paid might have been doubtful; but as interest is payable from the date of the note, no such difficulty arises. For these reasons it appears to me that the case falls within the words and the spirit of the 7 G. 1. c. 31., and that the debt was proveable.

1826.

CLAYTON
against
GOOLING.

HOLROYD and LITLEDALE Js. concurred.

Postea to the defendant.

PRINCE and another *against* LEWIS.

Wednesday,
April 26th.

DECLARATION stated, that the plaintiffs, before and at the time of the committing of the grievances thereafter mentioned, were and still are lawfully possessed of a certain close called *Covent Garden Market*, situate, &c. and of a market holden there for buying and selling of all and all manner of fruits, flowers, vegetables, roots, and herbs whatsoever, together with toll, stallage, and other commodities to such market belonging, whereby divers great gains during all the time aforesaid, until the committing of the said grievances, accrued to and were received by, and still of right ought to accrue and be received by the plaintiffs, to wit, at

The king granted to A., that he, his heirs and assigns, should have and hold a market in a place therein described, and within certain specified limits there, for the buying and selling of all kinds of vegetables, fruits, flowers, roots, and herbs. The grantee of the market had for his own profit permitted part of the space, within the limits described, to be used for other purposes than those specified in the grant. The remaining part of the space, within which the market was to be held by the terms of the grant, became insufficient for the public accommodation; and there was not, on ordinary occasions, space within the market for carts and waggons resorting thither with vegetables, &c.: Held, that the lord of the market could not maintain an action against an individual for selling vegetables in the neighbourhood of his market, and thereby depriving him of toll, even at a time when there was room in the market, without shewing that on the day when the sale took place he gave notice to the seller that there was room within the market.

&c. yet

1825.

~~Plaintiff~~

Plaintiff

against

Lawyer.

&c., yet the defendant, well knowing the premises, but contriving and wrongfully and *fraudulently* intending to injure the plaintiffs, and to deprive them of the profits which they might and ought to have had and enjoyed from and by their said market, &c. erected a new market for the sale of fruits, flowers, &c. near that of the plaintiffs. The second count charged, that the defendant, intending, &c. in a certain public street and highway there near to the market of the plaintiffs, that is to say, in a part of the said public street and highway, there within seventy-two yards of the plaintiffs' market, wrongfully and unlawfully and without any lawful warrant or authority, and without the licence or consent, and against the will of the plaintiffs, exposed to public sale, and sold to divers persons divers large quantities of vegetables, roots, and herbs; and the said persons who so bought the said vegetables, roots, and herbs, and who otherwise would have resorted to the plaintiffs' market, and there have bought the same, were induced to resort to the said last-mentioned street and highway, and there buy the vegetables, roots, and herbs so exposed for sale in the said street and public highway, which they otherwise would not have done, to the great damage of the plaintiffs, and the detriment of their market, by means of which said premises the plaintiffs were annoyed and disturbed in their market, and lost divers large sums of money. The third count stated, that the defendant, in a part of a public street within seventy-two yards of the market, exposed to public sale, and sold divers large quantities of vegetables, roots, and herbs which otherwise would have been brought into and sold at the plaintiffs' market, and divers persons were induced to buy the said vegetables, roots, and herbs so exposed to sale in the
said

said public street and highway, who otherwise would have resorted to the market of the plaintiffs and there have bought vegetables, roots, and herbs, and not in the said street or public highway, to the great damage of the plaintiffs and the detriment of their market. Plea, not guilty.

1826.

Plaintiff
against
Defendant.

At the trial before *Abbott C.J.*, at the *Middlesex* sittings after *Trinity* term 1825, the following appeared to be the facts of the case. King *Charles* the Second, by letters patent, granted to *William*, Earl of *Bedford*, that he, his heirs and assigns, should from thenceforth for ever have, hold, and keep a market within the parish of *Saint Paul, Covent Garden*, in a certain place there called the *Piazza*, near the church of *Saint Paul, Covent Garden*, extending from the said church towards the east 420 feet of assize, little more or less, and from the garden wall of the said Earl, there towards the north, 316 feet of assize, little more or less, as well within the rails as without on every day in every week (except *Sunday* and the feast of the *Nativity*) for the buying and selling of all kinds of fruits, flowers, roots, and herbs whatsoever, together with all liberties, free customs, tolls, stallage, and picage, and all other profits to the like market belonging, to hold unto the use of *William* Earl of *Bedford*, his heirs and assigns for ever. By act of parliament passed in 53 G. 3. c. lxxi. reciting these letters patent, and that the market had been held, that the Duke of *Bedford* was seised in fee of the market, and the ground and soil whereon it was then holden, the owners of the market were authorised to take from the seller the tolls then usually taken or collected within the market. The plaintiffs were the lessees of the market under the Duke of *Bedford*. The defendant resided in

James

1826.

PRINCE
against
LEWIS.

James Street, about seventy or eighty yards without the limits of the market, and between the hours of six and eight o'clock of the morning of the 4th of *January* 1825, a waggon loaded with greens was drawn up before his door, and the same were there exposed to sale and sold by him. There was evidence to shew, that during some part of the time while he was selling the greens there was room for his cart in the market. The agent of the plaintiffs demanded from the defendant a toll, but did not apprise him that there was room for his cart in the market. The defendant refused to pay the toll, upon the ground that he was not bound to pay toll for goods which he sold in *James Street*. The northern part of the market, which was next to *James Street*, was that part usually appropriated to carts and waggons with vegetables. On the north, the west, and east sides of the market, the plaintiffs let out to different individuals part of the space in the market-place between the denter stone and the railing, (that being the space allotted for carts and waggons with vegetables, &c. for sale,) standing-room for their carts, for which these persons paid yearly or weekly rents, and the space so let to them was always kept for them, and each of the tenants had a particular place for the purpose of placing his cart. This standing-room was occupied in the early part of the morning by the growers who come from the country, and afterwards by the higglers, and rent was paid by both. Part of the space in the centre of the market was let out to yearly tenants for sale of different articles, not being fruits, flowers, or vegetables; and there were china shops, old iron shops, and some public houses. About one-third of the space allotted for the market was occupied with covered buildings. It appeared that toll had been frequently

quently collected in *James Street*. In consequence of so much of the market-place being appropriated to other purposes, the remaining space was on ordinary occasions fully occupied. The Lord Chief Justice (without advert-
ing to the fact, that during part of the time while the defendant was selling his vegetables, there was room for his cart in the market,) was of opinion that the lessees of the market were not entitled to maintain this action, unless they gave up the whole space for the use of those who attend it from day to day for the purpose of selling those commodities, to the sale of which the market was devoted, and the plaintiffs were nonsuited, but liberty was reserved to them to move to enter a verdict. A rule nisi having been obtained for that purpose in last *Michaelmas* term,

1826.

 PRINCE
against
LEWIS.

Scarlett and *Marryat* now shewed cause. This action is founded upon a supposition that the defendant has fraudulently evaded the payment of toll, and that the profits of the market of the plaintiffs have been thereby abridged. Now the plaintiffs cannot be damnified by any sale out of their market, made at a time when their market was already fully occupied by other goods there exposed to sale, because they thereby derived from the tolls payable on those goods the full benefit contemplated by the grant of the franchise. It is therefore no injury to them if during such time a person sell near to their market. So if the lord appropriate the whole of the space intended for the market to other purposes, he cannot bring any action against a person for selling out of his market. Or if he appropriate part of the space intended for the market to other purposes, and the residue of the space is fully occupied by goods exposed to sale there,

1826.

Prison
against
Lewis.

there, he cannot maintain an action against other persons for selling near to his market. The market ought to be open to every person who chooses to resort there; but here particular individuals had the privilege of placing their carts in particular places, and the space allotted for the purposes of the market was generally full. If it was so at the time when the defendant was selling his goods in *James Street*, then the plaintiffs have sustained no damage whatever by the same. But assuming that during some part of the time he was so selling his goods in *James Street*, there was room in the market; still, in order to charge him with fraudulently evading the payment of toll, it ought at least to be shewn that he knew that there was space for him within the market at that time. He might reasonably presume that, as there was not room for his cart on ordinary occasions, there was not on that particular occasion; and if so, he cannot be said to have fraudulently intended to deprive the plaintiff of his toll.

Gurney, Denman, Brougham, and Hutchinson, contra. The plaintiffs by having proved the grant of a market, and a sale of goods near to their market by the defendant, were entitled to recover in this action. It lay upon the defendant to shew, that at the time of such sale there was not room for him within the market. There was evidence to shew that there was room for his cart in the market. Secondly, it is no answer to this action, to shew that the lord or lessee of the market has appropriated to other purposes part of the space intended for the market. If there was room for the defendant's cart, he has no right to resist the payment of toll. As between the lord of the market and the seller
of

of goods the former claims his toll, on the ground that the seller has the benefit of having his goods exposed for sale to the persons resorting to it, and he is defrauded of his toll by the act of the seller in not coming into the market but selling near to it. The defendant in this case does not deny that he had all this advantage, but refuses to pay, because part of the market is appropriated to other purposes than the sale of fruits, flowers, and vegetables. The defendant has not been damnified by part of the market having been so occupied, and he has derived a benefit from the market by selling his goods. *Rex v. Burdett* (a) is an authority to shew, that it is not unlawful for the lord of a market to erect and let out stalls in a market, if sufficient room be left for the market people.

1826.

 PRINCE
 against
 LEWIS.

ABBOTT C. J. I thought at the trial, that before the lord of this market or his lessee could complain in a court of law of a person who sells without the limits of the market, as doing him damage, it was incumbent upon him to shew, (or at least that the contrary should not have appeared in evidence against him,) that no part of the market which ought to be open and free of access for the public accommodation, is with his assent devoted to other purposes. I still continue of the same opinion. It may be true, perhaps, upon a critical examination of the evidence, that during some part of the time when the defendant's cart was standing in *James' Street*, there may have been room for it within the limits of the market. But assuming that to be the fact, it would not alter my opinion as to the right of the plaintiff to main-

(a) 1 *Ld. Raym.* 148.

1826.

PRINCE
against
LEWIS.

tain this action, because if, according to the general and ordinary use which is made of this market, the public are deprived of the accommodation which they ought to have, and if it generally happens that the space allotted to them is wholly filled up, then, inasmuch as the lord of the market or the lessee cannot complain of a person selling near the market at a time when it is full, it is incumbent upon the lord or the lessee, when on a particular occasion it is not wholly occupied, to give notice to any person whom he seeks to charge with a toll, that there is room. Not having done so in this case, I think he had no right to claim of a person selling out of the market the same toll as if he had sold in the market. It has been said that many of these erections in the market have existed from very ancient times, and that may be so. Probably when the market was first erected, the space allotted for it was more than the public accommodation required, but by the great increase of population, and the consequent increase of the consumption of vegetables, that space has now become insufficient. Those erections and those appropriations of the space allotted for the market, which in former times might be legitimate and reasonable, have now become illegitimate and unreasonable. Before the lord of this market can maintain an action against any person for defrauding him of his toll by selling near to it, he must remove all the obstructions and devote the whole of the space to the object for the furtherance of which the grant of a market upon that space was intended, viz. the accommodation of persons who come there to sell commodities of a particular description. It appeared in evidence that there were china shops and public houses upon this space. Now, although public
houses

houses may be convenient to persons resorting to the market, yet they may well be placed without the limits of the market. If they are inconsistent with that appropriation of the space which the law contemplated for the benefit of the public, the lord must remove them; if the lord wishes to bring an action against any person for not selling in the market, he must first shew that there has not been such an appropriation of the space allotted to the market as excludes that person from the market.

1826.

 PRINCE
 against
 LEWIS.

BAYLEY J. I am of the same opinion. Wherever there is the franchise of a market, the lord has certain rights, but he has also certain duties to perform towards the public in respect of those rights. One of those duties towards the public is, that the lord shall, as far as the limits of the market will allow of, take care that there is sufficient room for all the purposes of the market. Now this is a market created by charter for a specific purpose, and having specific limits. Generally speaking, if the space allotted for the market is more than is necessary for the purposes of the market in ordinary times, the lord may lawfully appropriate a part of that space to other purposes; but whenever the convenience of the public frequenting the market requires that the whole of the space shall be dedicated to the use of the market, then, as it seems to me, there is an obligation on the part of the proprietor so to dedicate it. And if at ordinary times there is not sufficient space for the purposes of the market, I think that he cannot bring any action against a person who sells out of the limits of the market, unless he shews that he first apprized that person that there was, at the time of the sale, room in the market to which he might resort.

1826.

Parish
against
Lawn.

If the lord does communicate that to the party, then there may be an obligation on him to go into the market, but he is not bound to attend *de die in diem* for the purpose of seeing whether there be or be not room. Now, in this case, the plaintiffs did not apprize the defendant that there was room for him in the market, but they merely demanded the toll. In my opinion there was a fraud, but it was a fraud practised by the lessors of the market, and not by the defendant. One of the objects which ought to be attended to by the owner of a market is, that the nuisance, which is the necessary consequence of it, shall be confined to the limits of the market. Now in this case it appears, that on market days *James Street*, which is out of the market, was treated by the lessors as a part of the market. It was encumbered with carts. The lord of the market claimed a toll of the persons selling in that street, he therefore permitted them to sell there, provided they paid him the toll, but if they did not, then he considered them as wrong-doers. In my opinion this nonsuit was right, because it was clearly proved that there was not sufficient room for the purposes of the market within the specified limits on ordinary occasions, and there was no specific communication to the defendant at the time he was selling in *James Street*, that there was room for him to place his cart within the limits of the market.

LITLEDALE J. (a) I am of opinion that this nonsuit was right. The Duke of Bedford is the owner of the soil, and has a grant from the crown to hold a market,

(a) Holroyd J. not having been present during the argument, gave no opinion.

which

which grant is confirmed by act of parliament. Such a grantee is not bound to extend the market over the whole of the soil; he may appropriate so much only of the soil as is sufficient for the purposes of the market, and he may shift and change the market to different parts of the space specified in the grant. That was expressly decided in *Curwen v. Salkeld* (a). The Duke of Bedford, as the owner of this franchise, therefore, was not bound to appropriate the whole of the space mentioned in the grant to the purposes of the market, unless it was actually necessary; but before he or his lessee can bring an action for the disturbance of the franchise, I think he is bound to shew that he has left sufficient room for the purposes for which the franchise was granted to him. Now here it appears, that there is not room at all times of the year for the persons resorting to this market. In consequence of this, many persons, and among them the defendant, sell out of the market. I concur in the argument urged on the part of the plaintiffs, that, generally speaking, in such an action as this, it lies upon the defendant to shew that there is not room for him within the market; for when the plaintiffs have once established their right, and it appears that the defendant has sold things, which are the subject of sale in the market, so near that it would *prima facie* be a fraud upon the owner of the market, it lies upon the defendant to rebut the case so established. But here it was shewn, that a part of the space allotted for the market was appropriated to other purposes. There were china shops, an old iron shop, and some public houses. The

1826,

 Plaintiff
 against
 Lewis

(a) 5 East, 538.

1826.

 PARSONS
 against
 LEWIS.

plaintiffs had no right to put them into that space which was distinctly appropriated by the grant for the sale of fruit, flowers, and vegetables. The lord of the market has the direction of the market; he may direct the vegetables to be sold in one place, the fruit in another, the flowers in another. So he may direct that carts should come to one place and baskets to another, by virtue of the general power which he has as lord of the market, but he is bound to appropriate the whole space to the purposes of the market, if the public convenience require it. Many actions similar to this have been brought against individuals selling their goods, so as to defraud the lord of a market; but in all those cases it appeared in proof, that there was sufficient room for those persons to come there if they thought fit; and I infer from thence, that it is necessary for the lord of the market always to set out sufficient space for the purposes of the market. If the right claimed by the plaintiffs were established, the Duke of Bedford or his lessees would gain more by this market than they have a right to do. They have now the full profit of the market, for they have the benefit of toll upon all the goods sold there; but by this action his lessees seek to establish a right to toll upon goods sold in *Russell Street* and *James Street*, which are without the limits of the market; by that means they would gain a much larger profit than they have a right to do. It is said, that upon the morning in question there was sufficient space for the defendant to place his waggon within the market; but it appeared in evidence, that for a considerable part of the year the market was so occupied that it was impossible for the defendant to get into it. I think he is

not

not bound to be upon the watch day by day, and hour by hour, to get a spot where his cart can stand. As it was proved that the market was generally occupied, it lay upon the plaintiffs to shew that the defendant knew, that on the morning in question there was space for his cart in the market. The rule for a new trial must be discharged.

1826.

PAINCE
against
LEWIS.

Rule discharged. (a)

(a) In order to maintain an action of this nature, it seems to be incumbent on the plaintiff to establish that the defendant *fraudulently* sold goods near to the market, but out of its limits, in order to avoid the toll. See *Blakey v. Dinsdale, Coup. 661.*

KEEGAN *against* SMITH.

Wednesday,
April 26th.

ASSUMPIT for meat, drink, washing, lodging, and other necessaries, found and provided for *Eliza Ann*, the wife of the defendant. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after *Trinity* term 1826, it appeared, that the action was brought by the plaintiff to recover the sum of 31*l.* 6*s.* 2*d.* for board and lodging, furnished to the defendant's wife, from the 19th of *July* to the 8th *November* 1824. The plaintiff's case was admitted. On the part of the defendant it was proved, that his wife, in *February* 1824, had instituted a suit in the consistory court for a restitution of conjugal rights, and in about a month after, another suit for cruelty and adultery. In the latter suit the Court, on the 3d of *December* 1824, decreed, that the defendant should pay to his wife, *pendente lite*, 30*l.*

A husband is liable for necessaries provided for his wife pending a suit in the ecclesiastical court, and before alimony decreed, although a decree afterwards made direct the alimony to be paid from a date before the time when the necessaries were provided for the wife.

1826.

~~Denman~~
KIRMAN
 against
 Denman.

per annum, in quarterly payments, to commence from the 8th. of *March* preceding. There was no distinct evidence that that sum had been paid, but the registrar of the court proved, that, in default of payment, a monition might have issued within fifteen days after the decree, and that no such monition had ever issued. The Lord Chief Justice was of opinion, that, even assuming that there was evidence sufficient to shew that the alimony had been paid from the 8th *March* 1824, still, as the decree for alimony was made subsequently to the time when the plaintiff's demand accrued, it was no defence to the present action; and he directed a verdict to be entered for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last *Michaelmas* term,

Denman and *Maule* now shewed cause. The debt was contracted by the defendant's wife between the commencement of the suit in the ecclesiastical court and the decree for alimony. During that period it was uncertain whether any or what alimony would be allowed. A perfect right of action had once accrued to the plaintiff; that cannot be barred by matter arising ex post facto. It is true, that the decree directs the alimony to be paid in respect of the period during which the plaintiff's demand accrued; but the circumstance of a husband having become bound by agreement, or by a judgment of a court of competent jurisdiction, to pay alimony from an antecedent period, cannot bar a right acquired before he became so bound.

Tindal,

Tindal, contra. It is laid down by Lord *Mansfield*, in *Osard v. Darnford* (a), that where the husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony; and if upon separation the husband agrees to make her a separate allowance and pays it, he is not liable, because she has no further demands upon him. Now in this case the wife had obtained a decree in the ecclesiastical court for alimony, payable in respect of the period during which the plaintiff's claim accrued, and it must be taken upon the evidence that that alimony was paid. She therefore had no further claim upon her husband; the plaintiff, her creditor, stands in her situation, and therefore can have no claim against him.

1826.

 KERRAN
 against
 SAMPSON.

ABBOTT C. J. At the time when this credit was given it was uncertain whether any or what alimony would be allowed. The decree of the ecclesiastical court by which it was allowed, took place after the whole debt claimed by the plaintiff was incurred. I am of opinion, that the plaintiff's right of action cannot be taken away by an event which has happened subsequent to the time when that right of action accrued. The rule, therefore, for entering a nonsuit must be discharged.

BAYLEY J. Although the creditor may be considered as claiming through the wife, yet if the husband does

(a) *Schw. N. P.* 279.

1826.

KESSEAN
against
BASSE.

not supply the wife with the means of procuring necessaries, he gives her a credit; and upon that ground the law implies an authority from the husband to her, that she may contract for what is absolutely necessary for her sustenance. In this case there is no proof that the husband supplied her with necessaries from the 19th of *July* to the 8th *November* 1824, during which period the plaintiff's demand accrued. The wife, therefore, had an authority from the husband to contract the debt in question.

HOLROYD and LITLEDALE Js. concurred.

Rule discharged.

Friday,
April 20th.

SHIPTON and Another *against* B. CASSON.

A. being indebted to *B.*, the latter agreed to accept the amount by instalments, *C.* undertaking to guarantee the payment of them. On the day after the first instalment became due, *C.* remitted to *B.* the amount, partly in bills not then due, and partly in bank notes. *B.* wrote, acknowledging the receipt of

ASSUMPSIT. The declaration, which was of *Easter* term 5 *G.* 4., contained the common counts for work and labour, and the money counts. Pleas, the general issue and set off for goods sold and delivered, money lent, paid, &c. At the trial before *Abbott* C. J., at the *London* sittings after *Hilary* term 1825, a verdict was found for the plaintiffs for 466*l.* 19*s.* 3*d.*, subject to the opinion of this Court upon the following case. On the 26th of *November* 1823, the defendant was indebted to the plaintiffs in the sum of 707*l.* 13*s.* 3*d.* On that day the plaintiffs, and *Henry Casson*, the defendant's father,

the bills and notes, and said they should be placed to *A.*'s account: Held, that although he was not bound to accept the remittance so made, yet having done so, he had thereby waived all objection to the time when it was sent, or the manner in which it was made up, and that he could not afterwards maintain an action against *A.* upon the ground of his having failed to pay the first instalment.

At the time of making the said agreement, *A.* contracted to sell and deliver to *B.* a large quantity of bark. He delivered a small part only, and failed to complete his contract. *B.* never returned the part delivered: Held, that *A.* was entitled to set off the value of that part against *B.*'s demand.

and

and the several other persons whose names appear to be subscribed, signed the following memorandum of agreement. "Whereas *B. Casson*, of *Sculcoates*, stands indebted to us, whose names are hereunto subscribed, in the several sums wrote opposite our respective names, which he being unable at present to satisfy, hath requested us to grant him time for payment, in manner herein written, to which, in consideration and on condition of his father, *H. Casson*, agreeing to guarantee the full payment thereof, we respectively consent, and hereby do, and each of us doth, grant and allow unto the said *B. Casson* time for payment thereof in manner following: and hereby promise and agree that we will not sue, implead, prosecute, or otherwise molest or harm the said *B. Casson* for or on account of our respective debts owing to us, unless or until some default be made by him or them, of or in the payment of the said respective sums at the times hereby agreed to, that is to say, at four months from the date hereof, payment at the rate of 7s. in the pound, at eight months from the date hereof, other 7s. in the pound, and at twelve months from the date hereof, the remaining 6s. in the pound." On the 27th of March 1824, *H. Casson* sent to the plaintiffs a letter as follows: "Inclosed are three bills, a bank post bill and bank note, value together 242l. 10s. 6d. Please credit my son's account for the amount, and acknowledge the receipt in course of post." The plaintiffs received the said letter and remittances, and on the 29th of March wrote the following letter in answer. "Yours of the 27th instant is received this day, inclosing bills and note, value 242l. 10s. 6d., which will pass to your son's account when paid." The defendant proved by way of set off, the delivery of bark to the plaintiffs to the

1826.

 SMITHSON
 against
 CASSON.

1826.

Sutton
against
Casson,

the amount of 22*l*. 4*s*. on the morning of the 26th of November 1823. In answer to which the plaintiffs proved, that such bark was part of a quantity bargained by the defendant to be delivered to the plaintiffs by the following contract: "Sold *T. Shipton* and Son the whole of the bark laid in *B. Boyer's* warehouse for 5*s*. per ton on the invoice price, to be transferred to his account, and after this, the 26th of November, at their risk and expense, the quantity about 57 tons, 17 cwt. *B. Casson* paying all expenses of delivery." The invoice price was 10*l*. per ton. Barges were hired by the plaintiffs to take away the bark, and one laid for some days waiting for the bark, and then went away, the defendant having failed to deliver the residue of the quantity stipulated according to his contract, within a reasonable time after the contract. It appeared that Mr. *Boyer*, in whose possession the said bark was, stopped the delivery of the residue to the plaintiffs, and they only obtained bark to the value of 23*l*. 4*s*. in part of the said entire quantity. The first instalment of 7*s*. in the pound on the said debt of 707*l*. 18*s*. 8*d*., due from the defendant to the plaintiffs, amounted to 247*l*. 13*s*. 7*d*., being 5*l*. 8*s*. 1*d*. more than the sum remitted. If the 23*l*. 4*s*. for the bark delivered to the plaintiffs was to be deducted and allowed to the defendant from the sum of 707*l*. 13*s*. 3*d*., then 7*s*. in the pound on the residue left the remittance made by *H. Casson* 2*l*. 19*s*. 3*d*. more than the first instalment would amount to. This action was commenced before the second instalment became due. The case was now argued by

Chitty for the plaintiffs. First, the remittance made by the father was too late. Where an agreement is entered

entered into for the discharge of a debt by instalments, the money must be paid on the very day appointed, *Leigh v. Barry* (a). The case of *Cranley v. Hillary* (b) shews how strictly the debtor is held to the performance of the bargain. There a composition was to be paid in bills, and it was held that the debtor ought to have tendered the bills on the right day, and that it was not sufficient that he had them ready to be delivered to the creditor on request. Secondly, the remittance sent was insufficient in two respects; first, it should have been in cash, and not partly in bills; secondly, the amount was insufficient, for the defendant had no right to set off against the demand of the plaintiffs the value of the bark delivered. The agreement bound the debtor to pay a certain sum of money on a certain day; he could not therefore claim a right to reduce that sum by setting off a counter demand. Again, the contract for the whole of the bark was entire, and had not been completed by the defendant; he could not therefore claim to set off the price of the small quantity delivered, *Waddington v. Oliver* (c), *Walker v. Dixon* (d).

Park, contra, was stopped by the Court.

ABOVE C. J. The first question is, whether the sum sent as payment of the first instalment was sufficient; that depends upon the question, whether the plaintiffs were bound to pay for the bark, which they received and kept, according to its just value, or whether they were entitled to keep it without making any such

(a) 3 Ark. 585. 1 Fern. 210.

(c) 2 N. R. 61.

(b) 2 M. & S. 120.

(d) 2 Stark. 221.

payment.

1826:

SHIPPON
against
GARRON.

1826.

Sutton
against
Canon.

payment. I agree, that if a contract is made for the purchase of a large quantity of any article, and a part only is delivered, the vendee is not bound to pay for that part before the expiration of the time fixed for the delivery of the whole. For if the seller fails to complete his contract, the purchaser may return the part delivered. But the case is very different if he elects to keep that part; he must then pay the value of it; and in contracts for the sale of goods the value of a part may always be ascertained. It is said, that the value not being ascertained cannot be set off; but the common form of set-off is, that the plaintiff is indebted for goods sold and delivered, which, at the time of the sale and delivery, were worth such a certain sum. In the case of a contract which cannot be well severed, difficulties as to such a set-off may arise, ex gr., if a contract is made for building a house, and that is only performed in part, it may be difficult to sever the value of the part finished from the value of that which remains to be done; but no such difficulty occurs in the present case. The second question is, whether the remittance came in time, and was of a proper nature. I agree that the plaintiffs were not bound to accept it; they might have returned it, and insisted upon their right of action. But instead of that they made the amount available to their own purposes, and undertook to place it to the credit of the defendant's account. Having done so, as against the plaintiffs, it must be taken that there was no objection either to the nature of the remittance, or the time when it was made.

BAYLEY J. I am of opinion that the remittance was sufficient, and that the objection to the time when it was

sent and the manner in which it was made up, was waved by the plaintiffs. Where an entire contract for goods is performed in part, and the whole may be completed, no action will lie in respect of that which has been done until after the expiration of the time fixed for the completion of the whole. But where some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the value (not the stipulated price) of those goods, although he is liable to a cross action for the breach of his contract. I therefore think, that the sum of 23*l.* 4*s.*, the value of the bark delivered, may properly be considered as constituting an item of set-off at the time when the instalment became due, although it might not be so immediately on the delivery of the bark. Secondly, it seems clear that the plaintiffs waved all objection to the payment made by *H. Casson*. After receiving the bills they wrote and informed him, that the amount should be placed to his son's account; but the father sent them in discharge of the instalment then due, and the plaintiffs had no right to place them to any other account. Having kept the bills and applied them to that account, they cannot now say that the remittance was too late, or that they were not bound to take the bills in payment.

1826.

SUITON
against
CASSON.

HOLROYD and LITTLEDALE Js. concurred.

Postea to the defendant.

1826.

Monday,
April 24th.

DOE, on the several Demises of TURNBULL and Others, *against* BROWN.

Where an award is void, and nothing can be done upon it without suit, the Court will not interfere to set it aside, because such suit must fail. But where a cause is referred by order of N. P., and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered; although such award be void, the Court will set it aside, for otherwise the party in whose favor the award is made will have judgment upon the verdict without any new proceeding to enforce the award.

EJECTMENT. At the *Carlisle* Summer assizes 1824, when this cause came on for trial it was referred, by order of nisi prius, to a barrister, who had power to direct in whose favour the verdict should be entered. In *April* 1825, no award having been made, the lessors of the plaintiff by notice in writing revoked the submission. In *August* 1825 the arbitrator made an award, directing a verdict to be entered for the defendant. In *Michaelmas* term 1825, *Alderson* obtained a rule nisi to set aside the award; against which

Patteson now shewed cause. This rule was obtained on the ground, that the award was made after the submission had been revoked. But the order of nisi prius is an instrument of a higher nature than a mere writing not under seal, and cannot be revoked by such a writing. The authority of the arbitrator was not therefore affected by the mere notice in writing given in this case. If, however, his authority was gone, the award is a nullity, and there is nothing for the Court to set aside, *King v. Joseph (a)*. In *Clapham v. Higham (b)*, the Court certainly did set aside an award made after the revocation of the arbitrators' authority, but in the judgment it is never noticed that the award was void in itself.

(a) 5 Taunt. 452.

(b) 1 Bing. 87.

Alderson

Alderson, contra, was stopped by the Court.

1826.

ABBOTT C.J. This is clear, where an award may be considered as a nullity, and nothing can be done upon it but by suit, the Court will not interfere to set aside the award; because any suit brought to enforce it must fail. But the award before us orders a verdict to be entered for the defendant, who will be entitled to judgment thereon unless we interfere. The rule must, therefore, be made absolute.

Dox dem.
TURNBULL
against
BROWN.

Rule absolute.

BLACKETT against WEIR.

Saturday,
April 29th.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial before *Bayley J.*, at the *Northumberland* Summer assizes, 1825, it appeared that the action was commenced to recover the price of a cargo of coals sold and delivered to a steam yacht company. In order to prove that the defendant had a share in the concern, one *Gilson* was called, who admitted on the voir dire that he also was a partner, and it was thereupon objected for the defendant that the witness was incompetent. The learned Judge overruled the objection, and the plaintiff obtained a verdict, the defendant having leave to move to enter a nonsuit. In *Michaelmas* term a rule nisi for that purpose was obtained by *P. Pollock*, who cited *Bland v. Andley* (a), *Brown v. Brown* (b), *Mant v. Mainxaring*. (c)

Where in assumpsit for goods sold and delivered, to which the general issue was pleaded, a witness called by the plaintiff to prove the defendant's liability, admitted on the voir dire that he (witness) was jointly liable: Held, that this did not render him incompetent.

(a) 2 N. R. 381.

(b) 4 Taunt. 752.

(c) 8 Taunt. 139.

1826.

BLACKETT
against
WEIR.

Scarlett (with whom was *J. Parke*) shewed cause. The witness *Gilson* was clearly competent for the plaintiff in this case. He came to speak against his own interest; for the admission that he was a partner made him liable to contribution, of which there was no other evidence. He could not then be interested in obtaining a verdict for the plaintiff by whom he was called. *Bauerman v. Radenius (a)* shews, that a party to the record cannot be a witness; but *Gilson* was not either actually or virtually a party to this record. It will be argued that he had an interest in making as many persons as possible appear to be partners, in order to reduce the amount of his own contribution. But there was nothing except his admission to shew that he was liable to contribute. [*Littledale J. Cosham v. Goldney and Another (b)* appears to be in point.]

F. Pollock. That is an authority in favor of the defendant, for it shews that a person alleged to be a partner may prove the sole liability of the defendant; he cannot, therefore, prove the converse, viz. that he is a partner, and that the defendant is jointly liable with him. The admission of *Gilson* that he was a partner in the steam yacht company rendered him *primâ facie* liable to the whole demand, and therefore it was his interest to fix the defendant as a joint contractor. *Lockart v. Graham (c)*, and *York v. Blott (d)*, appear to be in favor of the plaintiff, but they are distinguishable on this ground. Where it is admitted that there is a joint contractor, one of them may be called to prove the

(a) 7 T. R. 663.

(b) 2 Stark. 414.

(c) 1 Str. 35.

(d) 5 M. & S. 71.

identity of the parties; but here the witness was called to prove the existence of the joint contractor.

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BLACKBURN
against
WHEAT.

ABBOTT C. J. I am of opinion that the evidence of *Gilson* was properly received. On the motion for this rule cases were cited which shew that one joint contractor, having suffered judgment by default, cannot be called as a witness. To that position I accede; it is founded upon the rule that a party to the record cannot in general be examined. It is said that the witness had an interest: he had so; but it was his interest to defeat the plaintiff, for in the event of his recovery, the defendant would be entitled to contribution from the witness. In actions of trespass, witnesses apparently open to a much stronger objection are constantly admitted. In that action a recovery against one of several co-trespassers is a bar to an action against the others; and yet scarcely a circuit passes without an instance of a person who has committed a trespass being called to prove that he did it by the command of the defendant. In that case a verdict for the plaintiff would operate as a discharge to the witness, there being no contribution in actions of tort. Here, on the contrary, it brought a liability upon him.

BAYLEY J. I think that *Gilson* was a competent witness. To a certain extent he had an interest in obtaining a verdict for the defendant; for, having admitted his own liability, he made himself liable to pay a proportion of the costs, as well as the debt, if the plaintiff recovered. The only difficulty arises from his proving a partnership with the defendant; but his testimony would not prove that in any other action;

and

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Blackwell
against
Went.

and if the defendant can hereafter make out that he was not a partner, I think that he may perhaps at law, and certainly in equity, recover from the witness all that he is compelled to pay in this action.

PROBORN J. I also think that the witness was competent. The consequence of his evidence would be to render himself liable in another suit. It has been argued, that unless the defendant were fixed with a part, the witness might be made liable to pay the whole debt. But it appears to me that the defendant would have a right to recover from the witness, in an action at law for money paid to his use, the whole sum recovered in this action, if he could shew that the witness was originally liable to pay it. That is the ground upon which all actions for contribution proceed.

LITTLEDALE J. If the plaintiff recovers, the defendant will have contribution. If he fails, he may sue the witness for the whole, and the latter may then claim contribution from the defendant. To this it is answered, that in such an action he might not be able to establish that the defendant was a partner. But it must be remembered that the admission of the witness was the only proof of his own liability; it is therefore only reasonable to take the whole of his evidence together; and that shewed the defendant to be jointly liable. For these reasons it appears to me that the rule must be discharged.

Rule discharged. (a)

(a) See *Young v. Batorner*, 1 Esp. 103. *Hudson v. Robinson*, 4 M. & S. 475. *Goodacre v. Bream*, Peake's N. P. C. 174. *Birt v. Hord*, 1 Esp. 20.

1826.

The KING *against* The Sheriff of MIDDLESEX.Monday,
May 1st.

BAIL, above having been put in, the plaintiff's attorney gave to the defendant's attorney a parol notice of exception, but the exception was not entered in the bail book. The bail not having justified, an attachment issued against the sheriff; and a rule nisi having been obtained to set it aside,

Abraham shewed cause, and first objected that the affidavit upon which the rule had been obtained was not properly entitled; the title being "*Rex v. Sheriff of Middlesex*," without naming the cause in which the attachment issued.

On moving to set aside an attachment against the sheriff, it is sufficient to entitle the affidavit *Rex v. Sheriff of* —, without naming the cause, although it is convenient to do so.

An exception to bail must be entered in the bail book, and sensible that written notice of it must be given to the defendant's attorney.

ABBOTT C.J. It may be very convenient that the affidavit made on moving to set aside an attachment should contain in its title the name of the cause; but I have great difficulty in saying that is necessary, inasmuch as an indictment for perjury would lie upon it in the present form.

Abraham then contended that the notice of exception given to the defendant's attorney was sufficient.

F. Kelly, contra, relied upon *Cohn v. Davis* (a), where it was held that a written notice of exception must be given to the defendant's attorney in order to bring the

(a) 1 H. Bl. 80.

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against
The Sheriff of
MIDDLESEX.

sheriff into contempt, even where the exception was duly entered in the filazer's book.

Per Curiam. The sheriff had nothing to look to but the bail book, and that gave him no information of the exception. The rule for setting aside the attachment must therefore be absolute.

Rule absolute.

Tuesday,
May 2d.

HALDEN against GLASSCOCK.

Where a cause is referred by a judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a judge's order, on moving for an attachment for not performing the award, it must be shewn that the order enlarging the time was made by consent.

THIS cause was referred to an arbitrator, by an order of Abbott C. J., made upon hearing the attorneys of both sides, and by their consent, so as the arbitrator should make his award before the first day of last *Trinity* term, or such other time as the arbitrator by indorsement upon that order should appoint. Another order was afterwards made by the Lord Chief Justice in the following form: "I do order that the time for the arbitrator to make his award in this matter be enlarged until the 21st day of *June*;" and a third order, in similar terms, enlarged the time until the first day of *July*, before which day an award was made, ordering a sum of money to be paid to the plaintiff. A rule nisi for an attachment against the defendant for not performing the award was afterwards obtained upon affidavits that the award was duly executed, and that a copy of the award and of three several rules of Court, whereby the orders above mentioned were made rules of Court, had been served upon the defendant, and the money awarded duly

duly demanded. The defendant, in answer, made affidavit that the orders enlarging the time for making the award were not made by the consent of himself or his attorney; that the orders were not served upon him at the time when they were made; and that when the rule making the original order of submission a rule of Court was served upon him, there was not any indorsement upon it enlarging the time for making the award.

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HALDEN
against
GLAWCOCK.

Marryat shewed cause, and contended, that the award did not appear to have been made in time, for that none of the documents before the Court shewed that the time originally fixed for making the award had been duly enlarged, *Wohlenberg v. Lageman* (a).

Chitty, contra, contended, that although the second and third orders of the Lord Chief Justice were not expressed to be made by the consent of the parties, yet that it must be presumed they would not be made without proper authority.

HOLROYD J. To bring the party into contempt, at least it must be shewn that the enlargement of the time was by consent. The original order enabled the arbitrator to enlarge the time by indorsement; but there is no affidavit that he did so enlarge it. Suppose a rule of court were drawn up, simply ordering a party to abide by the award of *A. B.*, you could never bring that party into contempt for not performing the award, unless you shewed how the rule was obtained. Neither can you

(a) 6 *Trunt.* 251.; and see *Davis v. Vass*, 15 *East*, 37.

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against
GLASCOCK.

have an attachment in this case, without shewing that the second and third orders were duly made.

LITTLEDALE J. concurred.

Rule discharged.

Tuesday,
May 2d.

TAYLOR against TAYLOR.

The Court will not set aside an execution issued upon a judgment obtained by default, confession, or nil dicit, and served and levied by seizure upon the property of a bankrupt before his bankruptcy, the statute 6 G. 4. c. 16. s. 108. not rendering the execution in such case void, but merely enacting that the plaintiff in such execution shall share rateably with the other creditors.

THE defendant, by warrant of attorney of the 4th of November 1825, authorized certain attorneys therein named to appear for him and suffer judgment by nil dicit as of last *Trinity term* or *Michaelmas term*, then next for 4000*l.*, with a defeazance to be void on the payment of 2000*l.* on demand. Judgment for 4000*l.* by nil dicit was signed by the plaintiff on the 22d of *March* 1826, and a writ of *fiat facias* thereon issued, directed to the sheriffs of *London*, returnable on *Wednesday* next after fifteen days of *Easter*, commanding him to levy 2041*l.*; and under that writ the sheriff seized the goods of the defendant, and was in possession on and before the 7th of *April*. On that day an act of bankruptcy was committed by, and a docket was struck against the defendant, and on the 10th a commission issued, and on the 11th he was duly declared a bankrupt, and a provisional assignment executed. On the 10th of *April* notice of the docket and commission was served on the sheriff. A rule nisi had been obtained for setting aside the execution in this case, and for a stay of proceedings in the mean time, on the ground that by the statute 6 G. 4. c. 16. s. 108. under the circumstances of this case the execution creditor was not

not entitled to avail himself of the execution. That section enacts, "that no creditor having security for his debt, or having made any attachment in *London* or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy. Provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors;" and now

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against
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The Attorney General and *Storks* were heard against the rule, and *Scarlett* and *F. Pollock* in support of it. The principal question discussed was, whether an act of bankruptcy, having been committed, and a commission having issued after seizure, under an execution on a judgment by *nil dicit*, but before the return of the *fi. fa.* would defeat the execution under the 108th section of the Bankrupt Act 6 G. 4. c. 16. It was contended against the rule, that this was a case within the exception of the enacting part of the 108th section, because the execution was levied by seizure before the bankruptcy; and although the terms of the proviso were very large, they must receive a reasonable construction; for it never could have been intended to apply to a judgment obtained any length of time before the bankruptcy. It was probably meant to apply to those cases only where, pending an action, such a judgment by *nil dicit*

was

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was given. Secondly, it was contended that the execution was not void. On the other hand, it was argued, that the exception in the enacting part of the clause must have been intended to apply to judgments not comprehended in the proviso, otherwise it meant nothing. Those would be judgments obtained on verdicts which would be by a public not a secret act. It evidently appeared from the words used in the proviso, that the object of the legislature was to discountenance secret securities.

HOLKORD J. The act does not say that the execution shall be void, or that the creditor shall not avail himself of it, but merely that he shall not avail himself of it to the prejudice of other fair creditors, but shall be paid rateably with them. If the true construction of the act be that contended for on the part of the assignee of the bankrupt, he is not without a remedy; he may bring an action of trover against the sheriff if the goods be removed, or he may petition the Lord Chancellor. The question upon the act of parliament is of very general importance. It is therefore fit that the parties should have an opportunity of raising the question upon record, if indeed it be a question to be determined in a court of law; of which, however, I entertain considerable doubt.

LITTLEDALE J. concurred.

Rule discharged.

1826.

The KING *against* ELLIS.Friday,
May 5th.

THE defendant was indicted at a court of quarter sessions held before the justices of the city and county of *Exeter*, and the indictment charged, that he one piece of the current coin of this realm called a shilling, of the value of one shilling, of the money, goods, and chattels of *Susan Newman*, feloniously did steal, take, and carry away. Another count charged, that the defendant was a servant to *S. Newman*, and being such servant, one other piece of the current coin of this realm called a shilling, of the value of one shilling, of the money, goods, and chattels of the said *S. Newman*, feloniously did steal, take, and carry away, against the form of the statute, &c. The jury having found the prisoner guilty upon the indictment generally, the Court adjudged that he be transported to parts beyond the seas for the term of fourteen years. A writ of error having been brought upon this judgment; the error assigned was, that by the law of the land the defendant could not for the offence charged in the indictment be legally transported beyond the seas for the term of fourteen years, or for any longer term than seven years. This case was argued on a former day in this term, by

The statute 3 G. 4. c. 38. s. 2. enacts, "that if any servant shall steal any money from his master, and shall be convicted thereof, and be entitled to the benefit of clergy, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to benefit of clergy, shall be transported for fourteen years:" Held, that a servant convicted of petit larceny was not within the meaning of this statute, and that he was subject to be transported for seven years only.

Chitty for the prisoner. The judgment cannot be supported. The defendant, having been convicted of petty larceny, was liable to transportation for seven years only. This is not a case within the statute 3 G. 4. c. 38. s. 2., which enacts, "that if any servant, &c. shall feloniously steal any money, &c. from or belonging to his master

or

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or mistress, and shall be convicted thereof, *and be entitled to the benefit of clergy*, then every such offender, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and *entitled to the benefit of clergy*, may be transported for fourteen years." The statute contemplated cases where the party convicted was compelled to claim the benefit of clergy to exempt himself from the punishment of death. But petty larceny was at no period so punishable. (a). Clergy was not allowable at common law in petty larceny or mere misdemeanors (b). The statute 4 G. 1. c. 11., which first gave the Court a discretionary power of ordering transportation in certain cases, mentions petty larceny by name, and it limits the period to seven years. (He was then stopped by the Court.)

Perke, contra. The judgment of transportation for fourteen years is warranted by law. Secondly, at all events, it is good as a judgment of transportation for seven years. Thirdly, if the judgment cannot be supported, the prisoner may be remanded to the court below, in order that he may receive such judgment as the law will warrant. The judgment pronounced is warranted by the statute 3 G. 4. c. 38. s. 2. Before that statute all persons guilty of petty larceny, including servants robbing their masters, as well as others, might receive judgment of transportation for seven years. The object of that statute was to increase the punishment in the case of servants robbing their masters or employers. It must, therefore, have been the intention

(a) 4 Blac. Com. 238. 3 Inst. 218.

(b) 4 Blac. Com. 374.

of the legislature to subject such offenders to fourteen years transportation. There could be no doubt if the words "and shall be entitled to benefit of clergy" were omitted. In order to give effect to the manifest intention of the legislature, those words must be read, "shall not be excluded from the benefit of clergy." They have that meaning in the statute 4 G. 1. c. 11. from which they have been adopted into the statute 3 G. 4. c. 88. s. 2. The judgment, therefore, is a valid judgment. Secondly, it is a good judgment of transportation for seven years. In *Rex v. Collyer and another* (a), the defendants were convicted upon an indictment for assaulting a justice of the peace in the execution of his office, and adjudged to be imprisoned for a month, and ask pardon, and to advertise it. The two latter parts of the judgment were held to be void, but the former part good. It is true a defective judgment, omitting an essential part of the punishment required by law, is bad, *Rex v. Walcott* (b), *Rex v. Read* (c). But here the judgment is excessive. It is good for that part which is warranted by law, and bad for the residue. At all events, the prisoner ought to be remanded to the court below, in order that the proper judgment may be given, *Rex v. Kemworthy* (d).

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This was a writ of error brought to reverse a judgment, by which the prisoner, who was convicted of petty larceny, was sentenced to fourteen years transport-

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(a) 1 Will. 332.

(b) 1 Mod. 335.

(c) 16 How. 404.

(d) 1 B. & C. 711.

ation.

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ation. The objection was, that the offence charged being only petty larceny, the prisoner could not by law receive judgment for fourteen years' transportation, but for seven only. To sustain the judgment, the statute 3 G. 4. c. 38. s. 2. was relied upon. That section recites, that frequent depredations had been committed by servants, to the serious detriment and loss of their masters, and that it was expedient that such offenders, *when entitled to benefit of clergy*, should be made liable to a more severe punishment. It then enacts, "that if any servant shall feloniously steal any goods, chattels, money, &c. from or belonging to his master, and shall be lawfully convicted thereof, *and be entitled to the benefit of clergy*, then and in every such case such offender, instead of being subject to such punishment as may now by law be inflicted upon persons so convicted, *and entitled to the benefit of clergy*, may, at the discretion of the Court by or before which they shall be convicted, be adjudged to be transported beyond the seas for any term not exceeding fourteen years." It has been contended, that the expression "*entitled to the benefit of clergy*" limits the operation of the section to those offences for which a party convicted was compelled to pray benefit of clergy in order to save himself from death; and as petty larceny was an offence never so punishable, and for which therefore it never could have been necessary to pray the benefit of clergy, it followed that a party guilty of such an offence could not be considered as a person entitled to benefit of clergy. Before the passing of this act the statute 4 G. 1. c. 11. enacted, "that where any persons had been convicted of any offence within the benefit of clergy, and were liable to be whipt or burnt in the hand, as also where any persons should be thereafter

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convicted of grand or petit larceny, or any felonious stealing or taking of money, &c. either from the person or the house of any other, or in any other manner, and who by law should be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, it should be lawful for the Court, instead of ordering any such offender to be burnt in the hand or whipped, to order and direct that he should be sent to some of his majesty's colonies and plantations in *America* for seven years." Now it is to be observed, that in this statute, which is the first which authorizes courts of law to transport offenders to parts beyond the seas, petit larceny is mentioned by name. In the stat. 3 G. 4. c. 88. it is not. The object of the last statute being to increase punishment, we are of opinion that it should be construed strictly, and it being doubtful whether the legislature had in view petit larceny or grand larceny only; and the latter being the only description of larceny in respect of which the party convicted must have the benefit of clergy in order to exempt himself from a more severe punishment, we think it the safer course to confine the construction of the statute to those instances. The consequence is, that the judgment of the Court below is more severe than that which is authorized by law. But it is said, that the judgment is good as a judgment for seven years' transportation; but I cannot assent to that proposition. If the prisoner is sent out of the country for fourteen years, who is to say that he is to be discharged at the end of seven? It has been further urged, that the prisoner may be remanded to the court below, and there receive the proper sentence, that having been done in *Rex v. Kentworthy* (a);

(a) 1 B. & C. 711.

but

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Bishop.

but there is this material distinction between the two cases; there no judgment whatever had been passed in the court below; and this Court therefore ordered the prisoner to be remanded to the inferior court, in order to receive judgment. But here the court below has passed a judgment, and that judgment being erroneous, we think there is no ground to send it back to be amended. The consequence is, that the judgment pronounced by the court below must be reversed.

Judgment reversed.

Friday,
May 6th.

FINE, D. D. against BURGESS.

The stat.
27 G. 3. c. 44.
does not limit
the time for
proceeding
in the ecclesiastical court
against clerks
upon a charge
of fornication,
if deprivation
be the object
of the suit;
and, therefore,
where a suit
was instituted
in that court
against a clerk,
charging
(amongst other
things) fornication
committed more
than eight
months before
the commence-
ment of the
suit: Held, that a prohibition should go as to proceeding upon that charge for reformation
of manners, but that a constitution should be awarded as to proceeding for deprivation.

PROHIBITION. The declaration alleged, that by a statute of the 27 G. 3. (a), it was (amongst other things) enacted, that no suit should be commenced in any ecclesiastical court for fornication or incontinence, after the expiration of eight calendar months from the time when such offence should have been committed; yet the defendant, contriving, &c. had lately, to wit, in October 1824, against the form of the statute, drawn the plaintiff into a plea in the spiritual court, touching and concerning the crime of fornication and incontinence alleged to have been committed by him, the plaintiff, with divers females in the several and respective years 1810, 12, 13, 14, 15, 17, and 22, by wickedly and subtilly, in and by a certain libel or articles, objecting

(a) c. 44. s. 2.

articling

articling and libelling against the plaintiff in the said spiritual court in manner following. (The libel was then set out, by which it appeared that the present plaintiff was charged with various offences.) The first article alleged, that by the ecclesiastical laws, canons and constitutions of the church of *England*, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment, and to abstain from fornication or incontinence, profaneness, &c. *under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures, as the exigency of the case and the law thereupon may require and authorise.* The second article alleged that Dr. *Free* was a clerk in holy orders. The libel then proceeded to state the various acts of fornication and incontinence alluded to in the plaintiff's declaration, and many other instances of misconduct. The declaration concluded in the usual form, that the defendant continued to prosecute the plea in the ecclesiastical court, notwithstanding the king's writ of prohibition. The defendant, after denying the contempt, demurred generally to the declaration. Joinder in demurrer.

Campbell in support of the demurrer. The statute 1 H. 7. c. 4. enables persons having episcopal jurisdiction to punish clerks for incontinence, and it does not limit the time within which suits for that purpose are to be commenced. This statute is not recited, or in any way alluded to in the 27 G. 3. c. 44., which no doubt would have been the case had it been intended to limit the time for commencing the proceedings under it. It may be

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 against
 BUNGEY.

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—
 FARE
 against
 BURGOTHE.

collected from the title of the modern statute, "An act to prevent frivolous and vexatious suits in ecclesiastical courts;" that it was not intended to interfere with cases under the former act, for it can hardly be supposed that the legislature would treat a suit against a clergyman for gross profligacy as a frivolous and vexatious suit. It is not within the mischief intended to be remedied, and is therefore to be construed to be out of the provision of the statute, although within the words of it, *Com. Dig. Parliament* (R. 16). Again, the provision that no suit for fornication shall be commenced against parties after they have lawfully intermarried, can hardly apply to a priest; for his conduct before such marriage may have been so bad as to render him wholly unfit to remain in his office. Sir *J. Nicoll* has already given an opinion upon the case against the present plaintiff, by admitting those articles in the libel which charged the then defendant with incontinence. (a)

Denman, contra. There is no doubt that the 27 G. 3. c. 44. s. 2. must be construed in favor of the plaintiff in prohibition. It was not intended to repeal the former act, but merely to limit the time within which suits should be commenced. The title is general and the recital is, "whereas it is expedient to limit the time for the commencement of *certain suits* in the ecclesiastical courts;" not "suits against certain persons." Why, then, should priests be excepted out of the operation of the statute? If such an exception had been intended it would have been very easy to express it. [*Holroyd J.* Against a clergyman there may be an object beyond the mere punishment pro salute animæ.] The case of *Galizard v.*

(a) 2 *Addams*, 414.

Rigault,

Rigault (a), shews that these offences cannot be taken in two different aspects.

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FREE
against
BURGOYNE.

Campbell in reply. The foundation of the proceeding in the ecclesiastical court is, that the present plaintiff is a priest unfit for his office. The question resolves itself into this, whether this is a suit for fornication, within the meaning of the 27 G. 3. c. 44. s. 2. Suspension or deprivation is the object of the suit; if the prayer of the libel does not specify it, still if the ecclesiastical court may punish in that way, this Court will not grant a prohibition.

Cur. adv. vult.

The judgment of the Court was now delivered by ABBOTT C. J. This was a proceeding in prohibition, founded upon the stat. 27 G. 3. c. 44. s. 2., which limits the time for commencing certain suits in the ecclesiastical court. The declaration states, that the defendant, in October 1824, against the form of the said statute, drew the plaintiff into a plea in the spiritual court, concerning the crime of fornication and incontinence, alleged to have been committed by him in the years 1810, 12, 13, 14, 15, 17, and 22. Looking at the title of the libel, it is clear that it was not exhibited against him for that offence only, but for neglect of divine service on divers Sundays; for using the porch of the parish church as a stable; for converting to his own use and profit the lead on the roof of the chancel of the church; for refusing and neglecting and delaying to baptize or christen divers children of his parishioners; for refusing and neglecting

(a) *Salk. 552.*

handed
sent

D d 2

to

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against
BUNCEMAN.

to bury divers corpses, and for requiring illegal fees to be paid to him for baptisms and burials. As to those parts it is clear there must be a consultation. Then we come to the construction of the stat. 27 G. 3. c. 44. s. 2., by which it was enacted, "that no suit shall be commenced in any ecclesiastical court, for fornication or incontinence, or for striking or brawling in any church or churchyard, after the expiration of eight calendar months from the time when such offence shall have been committed, nor shall any prosecution be commenced or carried on for fornication, at any time after the parties offending shall have lawfully intermarried." It has been contended before us, that this statute extends to the clergy as well as the laity; and we think it does, as far as they and laymen are on the same footing; that is, where the object of the suit is reformation of manners or the soul's health; but that it was not intended to limit the time for proceeding against a clerk, *as such*, for deprivation. Such a suit is not frivolous or vexatious; it is not within the mischief or object of the statute. Reformation of manners is not the object, or at all events not the only object of this suit. The first article of the libel sets forth, that by the ecclesiastical laws and canons of the church of *England*, all clerks and ministers in holy orders, are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment, and to abstain from fornication or incontinence, profaneness, &c., "under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures as the exigency of the case and the law thereupon may require and authorize." The second article states that the present plaintiff is a priest or minister in holy orders of the Church of *England*.

These

These articles shew that one at least of the objects of the suit was to procure the deprivation or suspension of the plaintiff, a species of jurisdiction which the ecclesiastical court has no opportunity of exercising over laymen. Now in other temporal matters, such as forgery of orders, there cannot be any proceeding against a layman as such; but if he has obtained a benefice, he may be sued in the ecclesiastical court in order to his deprivation, according to *Slader v. Smallbrooke* (a). We think, therefore, that as to the charge of incontinence, the ecclesiastical court may proceed for the purpose of deprivation, and our judgment will be, that the prohibition stand as to proceeding upon the charge of fornication, with a view to reformation or the soul's health, but that there must be a consultation as to proceeding upon that charge for deprivation or any other punishment. This course was adopted in the case of *Townsend v. Thorpe* (b), which was a proceeding against a parish clerk, who was charged with several offences punishable in the temporal and not the spiritual courts, yet it was held, that there might be proceedings against him in the spiritual court in order to deprive him of his office, and as to that a consultation was granted. Objection has since been made to that case, on the ground that the ecclesiastical court had no authority to suspend or deprive a parish clerk. Perhaps that objection is well founded, but the rest of the case has never been questioned, and is an authority for our present decision.

Consultation awarded as to all but proceeding for incontinence with a view to reformation.

(a) 1 Lev. 138. 1 Sid. 217.

(b) 2 Ld. Raym. 1507.

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FAIR
against
BURGOYNE.

1836.

Friday,
May 5th.

FENNELL and Another *against* RIDLER.

A horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday.

THIS cause was tried before *Park J.* at the Summer assizes for the county of *Warwick*, 1825, and a verdict was found for the plaintiff. A rule nisi was obtained for entering a nonsuit, and cause was shewn against the rule on a former day in this term. *Clarke* was heard against the rule, and *Adams Serjt.* and *Balguy* contra. The material facts of the case, the arguments urged by the respective counsel, and the authorities cited, are so fully commented upon in the judgment of the Court, that it is unnecessary to state them here.

Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court.

This case came before the Court upon a motion for a new trial. It was an action upon the warranty of a horse. The plaintiffs were *horse-dealers*, and the horse was bought and the warranty given on a *Sunday*, and the only question was, whether, under the 29 *Car. 1. c. 7.*, the purchase was illegal, and the plaintiffs precluded from maintaining the action. That is an act for the better observation of *Sunday*, and after directing that every person shall on every Lord's day apply himself to the observation of the same by exercising himself in the duties of piety and true religion, publicly and privately, one of its provisions is, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof,

thereof, works of necessity and charity only excepted. That the purchase of a horse, by a horse-dealer, is an exercise of the business of *his* ordinary calling no one can doubt. And is there any thing in the spirit or frame of this act which will take such a purchase out of its operation? The spirit of the act is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit unless it is so construed as to check the career of worldly traffic. And is there any thing in the frame of it to prevent its applying to the case in question? It does not indeed apply to *all persons*, but to such only as have some *ordinary calling*; and the interposition of the word "business" between the words "labour and work" might justify a question, whether it included every description of the business of a man's ordinary calling, or whether it was not confined to such as was manual and calculated to meet the public eye. There is nothing, however, in the act to shew that it was passed exclusively for promoting public decency, and not for regulating private conduct; and though I expressed a doubt upon this point in *Blossome v. Williams (a)*, I am satisfied upon further consideration that it would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction. Labour may be private and not meet the public eye, and so not offend against public decency, but it is equally labour, and equally interferes with a man's religious duties. The same may be said of business or of work. Each may be public and meet the public eye;

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(a) 3 Barn. & Cress. 232.

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each may be private and concealed. There is nothing, therefore, in the position of the word "business" between those of "labour and work," which in our judgment can justify us in giving to it any thing but its ordinary meaning; and it seems to us that every species of labour, business, or work, whether public or private, in the ordinary calling of a tradesman, artificer, workman, labourer, or other person, is within the prohibition of this statute. The statute, in direct terms, provides that every person shall apply himself to the observation of the Lord's day, publicly and *privately*; so that private as well as public conduct was expressly within its contemplation. In *Drury v. De la Fontaine* (a), Lord C. J. *Mansfield* (after the Court had taken time to consider), lays it down, that if any man in the exercise of his ordinary calling, make a contract on a *Sunday*, that contract would be void (and the case before him was a private contract for the purchase of a horse), but he shewed that that case was not within the statute, because no one of the parties was in the exercise of the business of his ordinary calling. His expression that the contract would be *void*, probably meant only that it would be void so as to prevent a party who was privy to what made it illegal from suing upon it in a court of law, but not so as to defeat a claim upon it by an innocent party; and so it was considered by this Court in *Blowsome v. Williams* (b). That was also the case of a *private* sale of a horse, and an action brought upon a warranty, and to recover back the price. The objection was made that the purchase was on a *Sunday*. Though I expressed the doubt I have mentioned, whether the statute

(a) 1 Taunt. 185.

(b) 3 B. & C. 232.

applied

applied to *private* sales, such as were not open breaches of the *Sunday*, that was not the ground of the decision, but very distinct grounds were stated to shew that the statute did not apply, for the sale was substantially not on the *Sunday* but on a *Tuesday*. The defendant was the only person who was in the exercise of his ordinary calling, and the plaintiff did not know what his calling was, so that the defendant was the only person who had violated the statute, and it would have been against justice to have allowed him to take advantage of his own wrong to defeat the rights of the plaintiff, who was innocent. These cases, therefore, tend to support the present objection. And upon the principle that this statute is entitled to such a construction as will promote the ends for which it was passed, that it applies to private as well as public conduct, and that the purchase by the plaintiff was within the mischief intended to be suppressed, and within the words made use of to suppress it, we are of opinion that the plaintiffs cannot maintain the present action, and that the rule for a new trial must be made absolute.

Rule absolute.

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RIDLER.

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Saturday,
May 6th.

The KING against HAYTHORNE.

By an ancient parliament roll, it appeared that the commons, by their petition exhibited in parliament, prayed King Edward the Third, that the charter made to his liege subjects, burgesses of the town of *Bristol*, and the franchises by him granted to his said burgesses should be ratified and confirmed in that parliament. The answer to the petition was, that it was assented and agreed in parliament that the franchises whereof the petition made mention should be ratified and confirmed under the king's great seal. The charter was ratified by King Edward the Third accordingly: Held, that the crown was not prevented by this proceeding in parliament from granting a new charter to the burgesses of *Bristol*, varying the mode of electing a mayor from that provided for in the charter, recited in the petition to the king in parliament.

Queen Anne, by charter granted to the burgesses of *Bristol*, that they should be a body corporate, &c. &c., and released to the corporation that power of removing its members which had been reserved by a former charter of King Charles the Second, and released any just cause of complaint which might be against the corporation for having acted in opposition to it: Held, that it did not thereby appear that the queen granted this charter in consideration of the former charter granted by King Charles the Second, and that the queen's charter was not therefore void, although the supposed charter of Charles the Second did not exist.

A RULE nisi had been obtained for an information in the nature of a quo warranto against the defendant; calling upon him to shew by what authority he claimed to be mayor of the city of *Bristol*, and county of the same city. The affidavits in support of the rule stated, that *Bristol* was an ancient city, having divers liberties and privileges, but that it was not a corporation by prescription. That King Edward the First, by charter bearing date at *Westminster* the 28th day of *March*, in the twenty-eighth year of his reign, confirmed former charters granted by King Henry the Third, and further granted to the burgesses of *Bristol*, that they and their successors, *burgesses of the same town*, as often as, and whensoever they should choose their mayor (the time of war alone excepted), should present him to the constable of the castle of the town to be admitted, and not at the Exchequer. This charter was accepted by the burgesses, and was confirmed by King Edward the Second, in the fifteenth year of his reign, and again by King Edward the Third in the fifth year of his reign. By another charter bearing date at *Woodstock* the 8th of

August,

August, in the forty-seventh year of the reign of King *Edward* the Third, reciting that by the charters as well of his progenitors, formerly kings of *England*, which his said majesty had confirmed, as by his own, divers liberties and acquittances had been for ever granted to the *burgesses* of the town of *Bristol*, and their heirs and successors; and that at the petition of the mayor and commonalty, which was also recited, his majesty did grant, and by his said charter did confirm, for himself and his heirs, to the *burgesses*, and their heirs and successors for ever, that the town of *Bristol*, with its suburbs and precincts of the same, according to its metes and bounds, as they were limited, should be for ever in future alike separated, and in all respects exempted from the counties of *Gloucester* and *Somerset*, both by land and by water, that it should be a county by itself, and called the county of *Bristol*; and that the *burgesses*, their heirs and successors for ever, might have, within the town and the suburbs, and their precincts, by metes and bounds as they were limited, the liberties and acquittances thereunder written, and might fully enjoy and use them, that is to say, amongst other things, that every mayor of the town of *Bristol*, as soon as he should be elected into the same place, should be the escheator of his majesty, &c. The charter then contained a grant of several other privileges; and also, that the said *burgesses*, and their heirs and successors for ever, should have all other liberties and acquittances then before granted them, as well by his said majesty's progenitors as by himself, and also all other their customs and their profits thence arising: but it contained no provision as to the election of mayor. By letters patent, bearing date at *Westminster* the 1st day of *September*, in the forty-

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against
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forty-seventh year of his reign, reciting the last-mentioned charter, the same king appointed and commanded a perambulation between the county of *Bristol*, and the precincts of the same, as well by land as by water, and the said counties of *Gloucester* and *Somerset*. That a perambulation of the said county of *Bristol*, and the metes and boundaries thereof was had, and a return thereof was made into the Chancery, and the perambulation was exemplified. That by an act of parliament in the forty-seventh *Edward* the Third, the said charter, and all and singular the grants and liberties and acquittances, and all things contained and specified therein, and the perambulation exemplified by the letters patent, were ratified and confirmed to the burgesses of *Bristol* and their successors; that that act was never repealed, but still continued in force. It was then stated that, according to the belief of the party who made the affidavit, at the time of the granting the charter and the passing of the act of parliament, one of the liberties, privileges, and customs of the town of *Bristol* was, that the burgesses should choose from among themselves, each and every year, a burgess to be mayor, and that at or before the granting of the charter, and confirmation thereof, there was no common council distinct from the burgesses; that by charter of King *Henry* the Eighth, on the 5th of *July*, in the thirty-fourth year of his reign, *Bristol* was made a city; that in the fourth year of *Henry* the Sixth the charter and former act of parliament were recognized by parliament; that in the twenty-fifth year of the reign of *Charles* the Second, a certain number of the members of the corporation of *Bristol* attempted to surrender the rights and privileges of *Bristol* to his majesty, but that such surrender was never

never enrolled of record; that King *Charles* the Second, by letters patent bearing date the 2d of *June*, in the thirty-sixth year of his reign, granted that the citizens and inhabitants of *Bristol* should be a body politic and corporate, by the name of the mayor, burgesses, and commonalty of the city of *Bristol*. By that charter the right of electing a mayor and sheriffs was to be in the common council, and there was also reserved to the king a power of removing the mayor, recorder, or any of the aldermen, or the sheriffs, or any one or more of the common council, or the common clerk, steward, or coroners of the city. The affidavit then set forth a proclamation issued in the fourth year of King *James* the Second, which proclamation, after reciting that his majesty was resolved to restore all his cities to the same state as they were in before any surrender of their charters, deeds, and franchises, declared that corporations whose deeds of surrender were not enrolled, or judgment entered against them (of which the corporation of *Bristol* was one), and the mayor, bailiffs, &c., and the members respectively, upon the publication of that proclamation, should take upon themselves to act and proceed as a body politic; that that proclamation was accepted and acted upon by the mayor, burgesses, and commonalty of *Bristol*, and that the surrender was cancelled by the king. That the common council of the city of *Bristol* acted upon the said charter of the 36 *Car. 2.*, or upon some subsequent charter, which (if there were any such) the deponent, one of the burgesses, believed to be void in this respect; and that he received no notice, at any time previous to or on the 29th day of *September* 1825, to attend on that or any other previous day, for the election of a mayor of the said city for the year then ensuing; and deponent believed that no such notice

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was given to any of the burgesses for such purpose, unless to certain select bodies of the corporation, consisting of the mayor, aldermen, and common councilmen, amounting together to about forty-three persons. That at a meeting of these said select bodies *Haythorne* was elected to be mayor, and that all burgesses except the said bodies and their officers were excluded from being present, or voting at the meeting. Many other burgesses made affidavits that they had not any notice of the meeting. Upon these affidavits two objections to the election of *Haythorne* were raised; first, that it appeared, by the charter of the 28 *Edw. 1.*, that the mayor was at that time elected by the burgesses (not by a select body of them), and that the charter 47 *Edw. 3.* did not alter the mode of election, but confirmed all former customs. That the latter charter having been ratified by act of parliament, had the authority of such an act, and could not be altered by any subsequent charter from the Crown, and that, consequently, the mayor ought still to be elected by the burgesses at large, and not by the select body. Secondly, that if the charter of the 47 *Edw. 3.* might be altered by subsequent charters, that had not been done; for that the surrender to *Charles II.* was void, and, consequently, the charter founded upon that surrender was also void, and the old customs and privileges of the corporation of *Bristol* remained unaltered.

The affidavits against the rule were made by the chamberlain of the city and county of *Bristol*, who had the custody of the charters and other documents belonging to the corporation, and by the deputy keeper of his majesty's records in the *Tower*, to whom the charters and documents had been delivered for the purpose of examination. Those affidavits first set out a charter granted

granted by queen *Anne* in the ninth year of her reign, by which she granted to the mayor, burgesses and commonalty of the city of *Bristol* (amongst other things), that there should be out of the better and more discreet citizens forty persons besides the mayor, who should be the common council, and that as often as it should happen that any mayor, recorder, sheriffs, common councilmen, common clerk, steward of the court of the sheriffs of the county of *Bristol*, or coroners of the said city, should die or be removed, or go out of his or their office or offices, or that any election of the aforesaid officers or of any one or more of the same should thereafter be vacated or rendered ineffectual by incapacity or refusal, or by any other means, that then and in every such case another fit person or other fit persons should be duly elected from time to time by the common council of the said city of *Bristol*, or by the greater part of the same into those offices respectively, and should be sworn by the mayor of the said city, or by such other person, at such times and in such place and manner *as had been used and accustomed in the said city in that respect for the space of forty years then last past*. By another clause in that charter, her majesty released to the mayor, burgesses, and commonalty of the city of *Bristol*, and to their successors, all power and authority reserved to King *Charles* the Second by his letters patent, bearing date the 2d of *June*, in the thirty-sixth year of his reign, concerning the signifying the royal approbation of the mayor, &c. and all power reserved of removing the mayor and other officers, or any of the common council. The affidavit then stated, that this charter of queen *Anne* was accepted by the mayor, burgesses, and commonalty of the city of *Bristol*, and had ever

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ever since been acted upon, and that the uniform and constant practice and usage had been that on, &c. in every year the mayor, aldermen, sheriffs, and common council met in the Guildhall to elect the mayor and sheriffs for the ensuing year, when the mayor for the time being proposed one of the common council to be the new mayor, the aldermen and sheriffs another of the common council, and the residue of the common council a third, and that one of the three proposed who had the greatest number of voices of the whole of the common council in his favour, was declared elected. It was further stated, that from the year 1598 the books of the corporation contained a regular series of entries of the elections of the mayor for each year, and during the whole of that period, it appeared from those entries, that the elections were made by the common council in the manner above stated; that before the commencement in 1598, of this regular series of entries, there were some entries of elections of mayors in the reigns of *Henry VI.* and *Henry VII.*, and that it appeared from them that all the elections of mayors were by the common council exclusively; that there was no entry in any of the books, papers, or documents of the corporation, of any elections of the mayors by any other persons than the common council, and that the burgesses and commonalty never exercised, or claimed to exercise, any right or interference in the election of mayors. The affidavit of the deputy keeper of the records in the *Tower* stated, that from examining the books, documents, and papers delivered to him by the chamberlain of the city of *Bristol*, it appeared to him, and he believed, that the corporation of *Bristol* was a corporation by prescription, and that before the charter granted to the corporation

poration in the forty-seventh year of King *Edward the Third*, there was a mayor and common council in the corporation. That the earliest entry of an election of mayor in the books of the corporation was in the reign of *Henry the Sixth*. That there were entries of such elections in the reigns of *Henry the Sixth* and *Henry the Seventh*, and that such elections were by the common council exclusively. That no entry of such election by any other persons could be found.

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A copy of one of the entries of the election of mayor in the time of *Henry the Sixth* was then set out, by which it appeared, that "*Robert Sturmy* that time mayor, *J. B., J. S., &c.* with all the notable persons of the whole common council of the town of *Bristol* assembled in their council house, and by their right, discreet, and sad advisements chosen *R. H.* to be mayor during the year next coming, &c. Which mayor, and all the notable persons aforesaid, after the said election done, enacted and established the ordinances that follow," &c.

The proceedings in parliament in the 47th *Ed. 3.* were then set out from the rolls of parliament, by which it appeared, that the commons by their petition exhibited in the parliament, prayed the king as follows: "Please our lord the king of his good and especial grace; to grant that your gracious charter made to your lieges burgesses of your town of *Bristol*, containing that the said town with the suburbs and precincts thereof shall be a county by itself, and the franchises by you granted to your said burgesses by the same, shall be by you ratified and confirmed in this present parliament, together with the perambulation thereof made by your commission, and returned into your chancery of the

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said precincts, and of the bounds thereof, and the commons pray that this bill be confirmed in this present parliament." The answer to this petition was as follows: "It is assented and agreed in parliament, that the charter, franchises, and perambulation whereof this bill makes mention, be ratified, approved, and confirmed to the burgesses of the town of *Bristol*, and to their heirs and successors, under the king's great seal." The affidavit then stated, that after the said petition and answer, King *Edward* the Third, by an insuperable charter, reciting the former charter, separating the town of *Bristol* with the suburbs and precincts from the counties of *Gloucester* and *Somerset*, and also reciting the letters patent exemplifying the perambulation of the metes and bounds of the said county of *Bristol* returned into chancery, did by the assent and agreement of the prelates, nobles, great men, and commonalty in parliament ratify, approve, and confirm for ever to the burgesses of *Bristol*, their heirs and successors, as well the said recited charters, and all and singular the grants, liberties, and acquittances, and all other things contained therein, as the said perambulation exemplified as aforesaid, the granting part of which said charter was as follows: "We by the assent and agreement of the prelates, nobles, great men, and commonalty being in our parliament called together at *Westminster*, on the morrow of *Saint Edward* last past, do for us and our heirs, by virtue of these presents, ratify, approve, and confirm for ever to the said burgesses of *Bristol*, and to their heirs and successors, as well our said charter and all and singular the grants, liberties, and acquittances, and all other things contained and specified in the same charter, as the said

perambulation exemplified by our letters patent aforesaid concerning the metes and divisions so made between the aforesaid counties of *Gloucester* and *Somerset*, and the said county of *Bristol*, or the borders and bounds, and those letters and all and singular the things contained in those letters, as our charter and letters aforesaid more fully testify. In witness whereof we have caused these our letters to be made patent. Witness ourselves at *Westminster*, on the 20th day of *December*, in the forty-seventh year of our reign."

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The Attorney-General, Scarlett, Taunton, Ludlow, and G. R. Cross shewed cause. If the charter granted to this corporation by *Queen Anne* be a valid charter, it furnishes a complete answer to this application; for the affidavits shew the election of *Mr. Haythorne* to have been according to that charter. The first objection made on moving for the rule was, that before the charter of the 47th *Edw. 3.* no common council existed in *Bristol*, that none was constituted by that charter, and that the charter having been confirmed by act of parliament, could not be altered by any subsequent charter from the crown. That objection is founded upon a mistaken supposition that the charter of the 47th *Edw. 3.* was confirmed by act of parliament. The document extracted from the rolls of parliament cannot be considered as an act of the legislature confirming the charter; it is a mere petition from the commons to the king, that he would confirm; and accordingly his answer was, that he would confirm the charter under his great seal; and it appears that he did so. Admitting, then, that no common council existed at that time, there is nothing to shew that such a body might not afterwards be law-

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fully constituted by the authority of the crown; and the entries in the corporation books plainly shew that such a body did afterwards exist in the reign of *Hen. 6.*, and did then elect the mayor. It is unnecessary to notice the charter granted by *Car. 2.*, because that being founded upon a void surrender, was itself void. But no valid objection can be made to the charter of *Queen Anne*. The only one that can be suggested is, that it releases the power of amotion reserved to the crown by the charter of *Car. 2.*, and, consequently, treats that as an existing charter, and that the Queen being deceived as to that fact her charter is void. But the existence of the former charter is no where treated as the consideration for the new grant; and therefore, supposing the mistake suggested to have existed, it will not vitiate that grant. If so, the mayor was duly elected, and the rule must be discharged.

Wilde Serjt., Merewether, Tindal, and Bompas, contra.
The charter of the 28th *Edw. 1.*, which directs the burgesses of *Bristol*, as often as they should choose their mayor, to present him to the constable of the castle, shews that at that time the election was by the burgesses at large, and not by a select body. No alteration is suggested to have been made before the 47th *Edw. 3.*; when *Bristol* was made a county of itself, and that grant and all former privileges were confirmed by that which those who applied for the information call an act of parliament, but which the other side contend is improperly so called. Now the petition is, that the king would confirm the grant “in that present parliament.” The king, by his answer, agreed that it should be so, and afterwards he did confirm it, “by the consent and agreement of the prelates,

lates, nobles, great men, and commonalty *being in our parliament called together.*" The confirmation was, therefore, clearly an act of the king in parliament. The forms of statutes were not the same then as now; but, taking the whole proceeding together, the confirmation was clearly an act of the whole legislature, and consequently the constitution of the corporation of *Bristol* could not afterwards be altered by the royal authority alone, *Rex v. Miller (a)*. But supposing the Court to be of opinion that those proceedings have not the force of an act of parliament, the next question is, whether the mode of electing a mayor now adopted has been ordained by any valid charter. The charter of the 36th *Car. 2.* was founded upon a void surrender, and was therefore also void, and could have no effect upon the rights and customs of the corporation. The charter of *Queen Anne* was evidently granted upon the supposition that the charter of *Car. 2.* was binding; its principal object appears to have been to release certain rights reserved to the Crown by that charter, for, with the exception of the releasing part, it is almost wholly a charter of confirmation. The charter of *Car. 2.* being void, it appears that *Queen Anne* was deceived as to the main reason for making a new grant; that grant was therefore void. Assuming, however, the opinion of the Court to be in favour of this latter charter, still it does not warrant the mode of proceeding adopted at the election of *Haythorne*. It requires the election to be "at such times, and in such place and manner as had been used and accustomed in the said city in that respect for the space of forty years then last past." The charter of 36th *Car. 2.* ap-

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(a) 6 T. R. 268.

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pointed the election of mayor to be by the common council; but even supposing the corporation to have acted under that void provision until the charter of the 9 *Ann.*, still the words of the latter charter would not be satisfied by acting according to the mode pointed out by the charter of *Car. 2.*, for the election is to be as had been used for forty years, which period extends beyond the 36th *Car. 2.* In order to obviate that difficulty, reliance is placed upon the entries in the time of *H. 6.*, which state that the mayor was elected by the notable men of the common council assembled in the council house. But there is nothing to shew that up to that period the common council was known as a select body apart from the commonalty. There is not a single entry of the election or appointment of any person to be a common councilman, nor to shew of what number the body consisted, nor what qualification was required of its members. It is, therefore, but reasonable to suppose, that where the common council assembled in the council house is spoken of in the old entries, such of the commonalty as thought fit to attend at the council house were designated. At all events, these questions are very important, and present much difficulty; and where that is the case, according to the usual practice of the Court, such rules as the present are made absolute, in order that the matter may receive a more mature consideration than can be given to it on motion. (a)

(a) A similar rule had been obtained against the sheriffs of *Bristol*; the facts stated in the affidavits were the same, except that an entry of the election of a sheriff in the reign of *H. 5.*, which was alleged to be by the mayor and common council, was followed by a return to the crown by the whole corporation, which stated, "We, the mayor and commonalty, &c." This, it was said, proved that, by "common council," the whole commonalty were designated.

ABBOTT

ABBOTT C. J. I think that this rule ought to be discharged. It is a fact not now controverted, that as far at least as living memory can go, the election of mayor of the city of *Bristol* has been conformable to that mode in which the officer against whom this application was made, was elected. It is not distinctly controverted that the same mode of election has prevailed ever since the granting of the charter of Queen *Anne*; and no instance has been shewn of an election in a different mode since that time. But it is said, that an election under the charter of Queen *Anne* cannot be good, for two reasons: first, because that charter must be taken to be different from the charter of the 47th *Edw.* 3., and that a proceeding took place in that reign which had the effect of preventing the crown from granting any new charter to the city of *Bristol*, varying in its provisions from those contained in that charter or the liberties that had been previously enjoyed by the citizens. Another ground of objection made to the charter of Queen *Anne* is this: that the charter is in itself void, on the supposition that the Queen was deceived when she made that grant, inasmuch as it was founded upon the supposed existence of a charter of the 36th of *Charles* the Second, which charter was in truth void, being founded upon a surrender invalid for want of enrolment.

I will consider each of those grounds separately. First as to the proceedings which took place in the 47th year of *Edward* the Third. It appears that on the 8th of *August*, in the 47th year of his reign, King *Edward* the Third by his charter confirmed for himself and his heirs to the burgesses of *Bristol* all former liberties, and granted that *Bristol* should thenceforth be a county of itself to be comprised within certain metes and bounds;

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that in the following month the king issued a commission for a perambulation, in order to ascertain the metes and bounds of the county of the city of *Bristol*. After that commission had been issued, and the return made to it, a proceeding took place in parliament which, it is insisted, is an act of parliament in itself, and confirms all that had been done in *August* and *September* preceding by the king, and that the effect of it was to prevent the king from varying without an act of parliament the customs, liberties, and privileges confirmed by the charter. Now, one question is, whether that effect can properly be given to this proceeding in parliament. It begins (as many ancient statutes do) in the form of a petition or application by the commons to the king, and this is followed by an answer from the Crown. The commons address themselves to the king and say, "May it please our Lord the King, of his good and especial grace, to grant that your gracious charter made to your lieges, burgesses of the town of *Bristol*, containing, &c. shall be by you ratified and confirmed in this present parliament, together with the perambulation, &c. And the commons pray that this bill be confirmed in this present parliament." That being the prayer of the commons, let us now see what was the king's answer. "It is assented and agreed in parliament, that the charter franchises and perambulation, whereof this bill makes mention, be ratified, approved, and confirmed to the burgesses of the town of *Bristol*, and their heirs and successors." If it had stopped there, it might with great reason have been contended, that this confirmation, at the prayer of the commons, of that which had previously been done by the Crown in the month of *August*, was in itself an act of parliament. But it does not stop there ;

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for the answer goes on to say, that this shall be done *under the king's great seal*, clearly referring to a confirmation that was to take place by some act that was to be afterwards done by the king himself. Then there is a charter dated in *December* in the same year of King *Edward* the Third, shortly reciting this proceeding, and then going on to say, that "by the assent of the prelates and nobles, &c. we do ratify and confirm the previous charter which has been granted by us." This, therefore, is a proceeding entirely different from that which was the subject of consideration and decision in the case of *Rex v. Miller* (a). There the constitution of the corporation was settled by act of parliament, and it was held that it could not be varied by the acceptance of any charter inconsistent with that act of parliament. I find no fault with any dictum of any learned Judge in that case, that that which had been settled by the joint act of the legislature could not be altered by the Crown; but this case is quite different. Here the king specially reserved to himself, in his answer to the commons, that any ratification whatever which should be made in conformity to the prayer and desire of the commons, should be his own act under his great seal. It seems to me, then, that the proceeding in the 47th year of the reign of *Edward* the Third had not the effect of preventing the crown from granting in future any valid charter, varying in its provisions from those in the charter of the 47th of *Edward* the Third, and varying, amongst other things, the mode of electing corporate officers.

I come now to consider the next ground of objection, and that applies to the charter of Queen *Anne*.

(a) 6 T. R. 268.

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That charter is said to be void, because the queen was deceived when she made the grant, for that she manifestly granted this charter in consideration of the supposed validity of the charter granted by King *Charles* the Second; that charter being really invalid inasmuch as it was founded upon a surrender, which was void for want of enrolment. The question then is, whether the charter of Queen *Anne* was founded on that of *Charles* the Second. It appears to me that it was not. It does not begin by reciting it, it does not confirm it. The only reference made to it is, that the queen releases to the corporation that power of removing its members which had been reserved by the charter of *Charles* the Second, and releases any just cause of complaint which might be against the corporation for not having acted in all respects in conformity to it, or even in opposition to it. Now, does that import that the queen was then acting in conformity to the charter of *Charles* the Second? Might it not happen that, at that time, the queen, for the sake of ease and quiet to the corporation of the city of *Bristol*, and for the avoiding of all doubts and questions that might be made during her own reign or in after times, should declare: "I release you from all those odious powers of amotion which were reserved by the charter of King *Charles* the Second, and if any of you have offended against the terms of that charter, I release you from the consequences of that also." It seems to me, that that is by far the most reasonable construction to be put upon that charter; and then the very ground of the argument fails altogether.

The points which I have already mentioned are questions of law. I come now to consider that which is rather a matter of fact than of law. By the charter of Queen *Anne*,
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the mayor and the sheriffs are to be elected by the common council in such manner as they have been elected for the space of forty years prior to the granting of that charter. That space of forty years will go back beyond the date of the charter of *Charles* the Second. The affidavits in answer to the rule, shew that the present election has been made conformably to the usage that has prevailed from the time of the charter of *Queen Anne*, and if they had stopped there, that of itself would be evidence that it had been the usage for forty years before; for we must suppose that the usage which is found to have prevailed immediately after the acceptance of that charter, was conformable to the terms thereby imposed. But those who have made the affidavits have not stopped there; for they have shewn, that ever since the reign of *Queen Elizabeth* this has been the uniform course. It has been said, that all that has been done since the time of *Queen Anne*, and for above forty years before that charter, is entitled to no weight; because it appears from the affidavits that the same practice prevailed in the reign of *Queen Elizabeth*, when, in fact, there was no select body; no common council. It has been contended that the first institution of a common council, as a select body, was by the charter of King *Charles* the Second. But it by no means appears that the documents which have been referred to in the arguments or affidavits prove any such thing. There is, indeed, in the reign of *Henry* the Fifth an entry, that (in consequence of the death of an individual during the year he was serving the office of sheriff), at a meeting of the good men of the common council assembled together in the council house, they elected out of themselves three persons, in order that out of those three persons

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persons one might be chosen by the king and his council as sheriff of *Bristol*. And then a return was made to the crown of that election by the corporation containing these words: "We, the mayor and commonalty of our common assent have chosen three persons out of ourselves, in order that out of the three persons one may be chosen by our lord the king and his council as sheriff of *Bristol*." And it is insisted, that this is a return made by the body corporate at large, and that it is wholly inconsistent with the fact of the election having been made by a select body. It does not appear to me that there is any inconsistency in that respect. The corporation at large would be to make a return of the persons elected, out of whom the Crown was to choose one. They might very well say, "we have elected according to ancient usage," the fact being that the election was not at an assembly of the body at large, but at an assembly of a select body, supposing such a select body to have existed and to have exercised that privilege for a long period of years. It appears to me, therefore, that those documents by no means establish that there did not exist a body called a common council as far back as the time of Queen *Elizabeth*, and much further, but on the contrary, that the entry of the election by the common council serves to shew that there was. But then it is said, there is no entry in any of the corporation books of the election of common councilmen antecedent to that time, to shew how they were elected. That may be very true. I have no doubt in my own mind that the common councilmen before the reign of *Charles* the Second had been very irregularly selected and chosen, and not perhaps according to any definite or precise rule. Assuming that to be so,

if they had existed as a body known, although irregularly chosen, yet when the charter of queen *Anne* comes to make good that which has been so done, it is immaterial to inquire whether the body by which it had been done were duly and regularly constituted.

For these reasons I think we ought to discharge these rules. I have given my opinion somewhat at length, but I confess I do not, for one, entertain any doubt upon the law or the facts of the case; and not entertaining any reasonable doubt, I think I am called upon to discharge this rule, for what otherwise should we be doing? If we granted a rule on any trivial grounds, we should be calling into doubt the rule and government of one of the most important corporations of this kingdom. We ought to be very careful before we set on foot a proceeding that may have the effect of disturbing such a corporation. I do not mean to say that the law is to differ in the case of a great corporation from that which it would be in a small corporation. But what I mean is, this: that in proportion to the importance of any subject which is presented to our consideration, the human mind is so constituted, or my mind at least is so constituted, as to require somewhat more of conviction, or rather of proof, before I consent to interfere with long established usages and customs.

BAYLEY and HOLROYD Js. concurred.

Rule discharged. (a)

(a) *Littledale J.* had gone to chambers.

On moving for the rule against the sheriffs, *Wilde Serjt.* made another objection to the election, viz. that they had been in office within three years next before, which, he contended, was contrary to the 1 R. 2. c. 11. "It is ordained that none that hath been sheriff of any county by an whole year shall be within three years next ensuing chosen again."

Per Curiam. We think that does not apply to the case of a town corporate, although it may be a county of itself.

Rule refused on that point.

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1836.

Monday,
May 1st.

The KING against The Justices of WARWICK.

Where a coroner holds two or more inquisitions at the same place on the same day, he is only entitled to one sum of 9d. a mile for travelling expences, from the place of his abode to the place where the inquisitions are holden.

A RULE had been obtained for a mandamus to the justices for the county of *Warwick*, commanding them to allow certain fees to one of the coroners for that county. It appeared that the applicant had, on some occasions, held several inquests on the same day at the same place, and for each he demanded the fee of 1*l.*, and the sum of 9*d.* a mile for the distance from his usual place of abode to the place where the inquests were held. On another occasion, the coroner had gone from his own house to *A.* to hold an inquisition there, and from *A.* proceeded to *B.* for the like purpose, and he demanded for travelling expences 9*d.* a mile from his residence to *A.*, and also from his residence to *B.* The justices, at the last *Epiphany* sessions, allowed 1*l.* for each inquisition, and in the cases first mentioned a sum of 9*d.* a mile from the residence of the coroner to the place where the inquisitions were holden; and the last instance 9*d.* a mile from the coroner's house *A.*, and from *A.* to *B.*

The Attorney-General and *Holbeck* shewed cause contended, that the justices had put the right construction upon the statute 25 *G.2. c.29. s.1.*, which provides that for every inquisition which shall be duly taken in *England* by any coroner, the sum of 20*s.*; and 6*d.* a mile which he shall be compelled to travel from the place of his abode to take such inquisition, the sum of 9*d.*, over and above the said sum of 20*s.* shall be paid out of the county rates.

Scarlett, contra, contended, that the coroner was in every case entitled to the fee of 20s.; and 9d. a mile from the place of his abode to the place of holding the inquest.

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The King
against
The Justices of
Warwick.

ABBOTT C. J. Where a coroner holds two or more inquisitions at the same place on the same day, it cannot be said that he is compelled to travel thither in order to take the second and subsequent inquisitions. His journey has been accomplished in order to hold the first. In like manner, when he had gone to *A*. for the purpose of holding one inquisition, and proceeded thence to *B*. to hold another, it cannot be said that he travelled further than from *A*. to *B*., in order to discharge his duty in this second instance.

Rule discharged.

The KING against The Justices of ESSEX. (a)

AT the *Epiphany* sessions for the county of *Essex*, 1826, *George Frost* appealed against an order made by two justices, for diverting and turning a certain part of a public footway in the parish of *Mountnessey*, in the said county. It was stated in the notice of appeal, that *George Frost*, of the parish of *Mountnessey*, a rated inhabitant of the said parish, intended to appeal against the order, &c., but it was not stated that he was injured or aggrieved by the order, and it was objected, that the

In a notice of appeal against an order of two justices for stopping or diverting a public footway, it is necessary to state that the party intending to appeal is injured or aggrieved by the order.

(a) This case was decided in *Hilary* term, but was accidentally omitted in the part containing the cases decided in that term.

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The King
against
The Duke of
Kent

54 G. 3, c. 68. s. 3., gave the right of appeal only to the person or persons injured or aggrieved by the order or proceeding; and that it was therefore necessary for the party intending to appeal, to shew by his notice that he was a person injured or aggrieved; for otherwise he did not come within the description of persons entitled to appeal. The court of quarter sessions were of opinion that the notice was insufficient in this respect, and they refused to hear the appeal. A rule nisi had been obtained by Jessopp for a mandamus commanding the justices to cause continuances to be entered, and to hear and determine the merits of the appeal at the next quarter sessions.

Knor and Brodrick shewed cause, and contended, as before, that the party could not shew himself to be entitled to appeal unless he described himself as a party aggrieved.

Jessopp and Dowling contra. The statute in question does not require that the grounds of the appeal should be stated; the party was not therefore bound to shew how he was aggrieved by the order. That was to be made out by evidence at the hearing of the appeal; and if he could not shew himself aggrieved, it would be a sufficient reason for dismissing the appeal. Prior facie every person is aggrieved by the stopping up diverting of a public footway, and as the appellant not compelled to state how he is aggrieved, it would be useless to describe himself as a party aggrieved. He would not give the respondents any information of the case which they had to meet.

ABBOTT C. J. The matter in question, viz. the stopping-up or diverting of a public highway, affects in a certain degree all his majesty's subjects, and therefore as the statute has not given a right of appeal to all persons, but merely to the *party aggrieved*, we must suppose that the legislature intended to confer that privilege upon those persons alone who have sustained some special and peculiar injury, and not to extend the power of appealing to any captious person whomsoever. Upon the whole, then, I am of opinion that, in order to satisfy this statute (without giving any rule for the construction of others), it should have been stated in the notice that the appellant was aggrieved. This rule must therefore be discharged.

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The King
against
The Justices of
Essex.

Rule discharged.

PHILLIPS *against* PEARCE.

Tuesday,
April 14th.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial before *Alexander C. B.*, at the last Spring assizes for the county of *Surrey*, the following appeared to be the facts of the case: The parishioners of *Wandsworth* were in possession of land in the parish upon which houses were built, the rent of which was applied in aid of the church rates. There were no documents to shew how they became possessed. Six years ago the old houses were pulled down, and new ones built out of the church rate. Mrs. *Sadler* occupied one of them, and paid twenty-five guineas a year rent to

Land belonging to a parish was occupied by *A.*, and he paid rent to the churchwardens. They executed a lease of the same land for a term of years to *B.*, and gave *A.* notice of the lease. In an action for use and occupation by *B.* against *A.*: Held, that *A.* was not estopped by having paid rent to the

churchwardens from disputing *B.*'s title, and that the latter could not derive a valid title from the churchwardens.

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the churchwardens, and in 1824 she married the defendant. These premises were leased by the churchwardens to the plaintiff on the 27th of *December* 1824, for twenty-one years from *Michaelmas* preceding, in consequence of a resolution of the vestry. From *Michaelmas* 1823, up to the time when this lease was executed, no rent had been paid. One year's rent was due to the churchwardens, and a quarter's rent to the plaintiff. The rent due to the churchwardens was paid in *February*. On the 19th of *January* 1825, the churchwardens gave notice to the defendant that the plaintiff was the landlord of the house. The plaintiff on, &c., demanded a quarter's rent. The only objection the defendant made was to paying it quarterly. A distress was then put in. The defendant called upon the broker and said he would pay 6*l.* 11*s.* 3*d.* if he would allow him a week or two. At the expiration of that time he refused to pay. Upon these facts it was objected by the defendant, that as the churchwardens were not a corporation so as to purchase lands or take by grant, they could not make a lease of land belonging to the parish; and if the lease made to the plaintiff were void, he had no title to the rent. On the other hand it was contended on the part of the plaintiff, that the defendant by having paid rent to the churchwardens had admitted their title, and that he could not therefore dispute that of the plaintiff which was derived from the churchwardens. The Lord Chief Baron was of opinion that the lease granted by the churchwardens was void, and he directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a verdict for two quarters' rent.

Thesiger

Thesiger moved accordingly, and relied upon *Rennie v. Robinson* (a) as an authority to shew that the defendant could not call in question the title of the plaintiff. There the premises had been devised to a Mrs. *Williams* before her marriage. Her husband demised to *Robinson* as a yearly tenant, and afterwards made a lease to *Rennie*, to which Mrs. *Williams* refused to assent. The husband gave notice to *Robinson* of the transfer, and *Rennie* demanded the rent, but *Robinson* paid it to Mrs. *Williams*, and never attorned to *Rennie*. It was held by the Court of Common Pleas, that as *Robinson* had acknowledged the title of *Williams*, he could not impeach that of *Rennie*, which was derived from *Williams*.

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 PHILLIPS
 against
 FRARCE.

ABBOTT C. J. A man by paying rent to churchwardens, cannot make them a corporation when they are not so by law. Many inconveniences have been experienced in consequence of lands belonging to parishioners, who are not by law a corporation. The legislature has provided a remedy for these inconveniences in certain cases by the statute 59 G. 3. c. 12. s. 17. which enacts, that the churchwardens and *overseers* shall take and hold in the nature of a body corporate for and on behalf of the parish, all buildings, lands, and tenements belonging to the parish. That statute does not extend to this case. I think, therefore, that the churchwardens alone had no title to the land, or the rent which issues from it.

Rule refused. (b)

(a) 1 Bing. 147.

(b) See *Doe dem. Grundy v. Clarke*, 14 East, 488.

1826.

Saturday,
April 15th.GRANT and Others *against* FLETCHER and
Another.

Where a broker, having made a contract, entered it in his book, but did not sign it, and afterwards signed and delivered bought and sold notes to the contracting parties materially differing from each other: Held, that there was no valid contract in writing to bind the parties.

ASSUMPSIT for not accepting 400 bags of *Egyptian* cotton pursuant to contract. Plea, general issue. At the trial before *Hullock* Baron, at the last Spring assizes for the county of *Lancaster*, the following appeared to be the facts of the case. The plaintiffs having received advices, that 600 bags of cotton were shipped for them at *Alexandria* by the ship *Robert*, of which one *Wake* was master, directed their broker, *Withington*, to sell 400 bags at 17½d. per lb. *Withington* accordingly entered into a verbal contract with the defendants, and made the following entry of it in his memorandum book: "Sold *Peter Fletcher* and Son 400 *Egyptians*, to arrive per *Robert, Wake*, at 17½d. per lb." And he delivered to the defendants the following note of the contract: "*Robert, Wake*, 400 bags of *Egyptian* cotton at 17½d., shipped on the 22d of *February* for *Wm. Grant* and Brothers. — *Henry Withington*." On the same day he delivered to the plaintiffs the following note: "400 certain to Messrs. *Fletcher* and Son at 17½d., ten days and three months from the delivery, you allowing me my commission, *H. W.*" It was objected, that as the notes delivered to the contracting parties were different, neither was bound, and *Cumming v. Roebuck* (a) was cited. The learned Judge was of opinion, that there was no valid contract binding both parties, and the plaintiff was nonsuited.

(a) *Holt's N. P. C.* 172.

Cross Serjt. moved for a new trial. It may be conceded, that where a broker delivers to the contracting parties two instruments, each of which contains a distinct contract, neither party is bound. But here, neither of the notes delivered to the parties contained a complete contract. That delivered to the defendants did not import a contract of sale, nor were the names of the buyers mentioned. That delivered to the plaintiffs did not mention the commodity sold. The contract of sale was verbal, and the question is, whether there was any note in writing of that contract. Now, the entry by the broker in the memorandum book, together with the note delivered to the defendant, did constitute a complete contract. For they contained the names of the buyers and of the sellers, the description of the commodity sold, and the price; and that being so, there was a note in writing of the contract.

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 GRANT
 against
 FLETCHER.

ABBOTT C. J. The broker is the agent of both parties, and, as such, may bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the *same* contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. The entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it. A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed: but if the notes are imperfect, as in the present case, an unsigned entry in the book will not supply the defect. It

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is the duty of brokers to make the contract so as to be binding on both parties. They are employed to prepare contracts on which great sums of money depend, and I must say, that in many cases which have come before me they appear to conduct their business in a very slovenly, negligent manner.

Rule refused.

DOE, on the Demise of JOHN BIRTWHISTLE, against VARDILL.

Friday,
May 5th.

A child born in Scotland, of unmarried parents, domiciled in that country, and who afterwards intermarry there, is not by such marriage rendered capable of inheriting lands in England.

EJECTMENT for an undivided third part of land in several parishes in Yorkshire. Plea, the general issue. At the trial before Bayley J., at Yorkshire Spring assizes 1825, the jury found a verdict in substance as follows: *William Birtwhistle* being seised in his life-time in his demesne as of and in one undivided third part (the whole in equal parts to be divided), of and in the premises mentioned in the declaration, on the 12th of March 1771 died so seised without leaving any issue of All the brothers of the said *William Birtwhistle* died in his life-time, and they all died without issue, except *Alexander*, one of the said *William*, who married and had issue in the manner and at the time hereinafter particularized. The said *Alexander Birtwhistle* came into Scotland in the year 1771 and was domiciled there, and there remained so domiciled until the time of his death, which was mentioned. One *Mary Purdie* was at that time and remaining in Scotland

during the whole of the period of time in which *Alexander Birtwhistle* was so domiciled there as aforesaid. *Alexander Birtwhistle* and *Mary Purdie* being so domiciled in *Scotland*, the said *Alexander Birtwhistle* did cohabit with the said *Mary Purdie*, and did beget upon the said *Mary Purdie* the within named *John Birtwhistle*, which said *John Birtwhistle* was the only son of the said *Alexander Birtwhistle* and of the said *Mary Purdie*, and was born in *Scotland* on the 15th of *May* 1799. After the birth of the said *John Birtwhistle*, that is to say, on the 6th day of *May* 1805, the said *Alexander Birtwhistle* and *Mary Purdie* were married in *Scotland* according to the laws of *Scotland*. On the 5th of *February* 1810 *Alexander Birtwhistle*, the father of the said *John Birtwhistle*, died in *Scotland*, seised to him and his heirs of divers lands and tenements there situate, leaving the said *John Birtwhistle* him surviving, who, after the death of his father, was, duly according to the law of *Scotland*, served heir to the said lands and tenements of the said *Alexander Birtwhistle*, and now holds and enjoys the same in his own right, he, the said *John Birtwhistle*, having from the time of his birth hitherto dwelt and remained in *Scotland*, and been domiciled there. If a marriage of the mother of a child with the father of such child takes place in *Scotland*, such child born in *Scotland* before the marriage is equally legitimate by the laws of *Scotland* with children born after the marriage, for the purpose of taking land and every other purpose. (a) The case was now argued by

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(a) It was admitted on the argument, that this statement of the law is subject to qualification, viz. "if begotten and born whilst such father and mother were respectively unmarried, and if they respectively continued unmarried from the time when such child was begotten until the time of their intermarriage."

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Tindal for the lessor of the plaintiff. The lessor of the plaintiff being legitimate by the law of the country where he was born, is legitimate all over the world; for legitimacy is a personal status, which accompanies a man wherever he goes. The marriage of the parents is to be decided according to the law of *Scotland*, where they were domiciled; and a marriage valid there is valid every where. Why then should not the legitimacy of the offspring of such marriage be decided in the same mode? It is part of the *Scotch* law of marriage, that a marriage solemnized under the circumstances stated in this special verdict is presumed to have taken place before the birth of the child. That is *præsumptio juris et de jure*, against which no averment is allowed, and, consequently, the child is *legitimus*, not *legitimus*. There is nothing contrary to this in the definition of an heir by the law of *England*. In *Co. Litt.* 7 b. it is said, "Hæres, in the legal understanding of the common law, implieth, that he is *ex justis nuptiis procreatus*; for *hæres legitimus est quem nuptiæ demonstrant* and is he to whom lands, tenements, or hereditaments by the act of God and right of blood do descend some estate of inheritance." The lessor of the plaintiff contends that he was born *ex justis nuptiis*, according to the law of the country where he was born; and that the question ought to be determined. Now the law which has been commonly called the *Merton*, c. 9. applicable to this case. That law, properly speaking, a statute, but a refusal by parliament to make a statute, introducing the civil law into this country, and leaves the present law untouched, which relates to a person not born in a country where that law does

according to which he is legitimate. In questions of dower, where parties have not been married in *England*, if there is an issue ne unques accouple, &c. that must be tried by a jury, upon evidence of the law prevailing in that country where the marriage took place, *Ilderton v. Ilderton* (a). So, also, the question of legitimacy must be decided by evidence of the law prevailing in the country where the child was born. The special verdict finds what is the law of *Scotland* upon this point, and that is founded upon the canon and civil law, both of which recognize the effect of a subsequens matrimonium, in rendering legitimate the issue born before. *Balfour's Practice*, p. 239. s. 9.; *Craig*, b. 2. *diag.* 13. s. 16.; *Bancton*, b. 1. tit. 5. s. 54.; *Erskine*, b. 1. tit. 6. s. 52.; *Nov.* 19. 89.; *Pothier Traité du Contrat de Marriage*, p. 5. c. 2. art. 2. ss. 1—5., *M'Adam's case* (b). These authorities fully establish, that in countries where that law prevails the subsequens matrimonium is by a fiction of law referred back to the time of procreating the child. According to the law of *Scotland*, then, the lessor of the plaintiff was legitimate, and the question here being one which ought to be decided upon the principles of international law, let us see what law ought to govern the decision of this case. *Vinnius*, tit. 1. "De jure personali," says, "Status est personæ conditio aut qualitas quæ efficit ut hoc vel illo jure utatur, ut esse liberum, esse servum, esse ingenuum, esse libertinum, esse alieni, esse sui juris." *Huber*, in his treatise, "De conflictu legum," b. 1. tit. 3., gives three rules, by which it is to be decided how far the law of one country shall be

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(a) 2 H. Bl. 145.

(b) 1 Dow. 148.

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received in another. He introduces the subject with this observation: "*Sæpe fit ut negotia in uno loco contracta, usum effectumque in diversi locis imperii habeant aut alibi dijudicanda sint.*"—and then follow his rules, 1st. *Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant neque ultra.*" (The second is not material to this question). 3d. *Rectores imperiorum id comiter agunt ut jura cujusque populi, intra terminos ejus exercita, teneant ubique vim suam, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" In the same book, s. 8. it is said, "*Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, præjudicii aliis non creandi.*" And in s. 9. "*Porro non tantum ipsi contractus ipsæque nuptiæ, certis locis rite celebratæ ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt.*" In s. 12. "*Ex regulis initio collocatis etiam hoc axioma colligitur. Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu ut ubivis locorum eo jure quo tales personæ alibi gaudent vel subjecti sunt, fruuntur et subjiciantur.*" It must be conceded, that these rules can only apply where our laws admit the existence of a corresponding status, and where they are not at variance with any positive law, consequently they do not apply to the status of slavery, which is not recognized in this country. In many instances, the laws of foreign nations have been allowed to be imported here. In *Dalrymple v. Dalrymple*

rymple (a) Lord *Stowell* says, that the cause "being entertained in an *English* court, it must be adjudicated according to the principles of *English* law applicable to such a case. But the only principle applicable to such a case by the law of *England* is, that the validity of *Miss Gordon's* marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of *England* withdraws altogether, and leaves the legal question to the exclusive judgment of the law of *Scotland*." In like manner, a marriage celebrated according to the law of the country where the parties are domiciled, cannot be dissolved by the law of divorce prevailing in another country, *Lolley's* case (b), which is recognised by Lord *Eldon* in *Toovey v. Lindsay* (c). In the case of other contracts, they are construed according to the laws of the place where they are made, *Feaubert v. Turot* (d), *Freemoult v. Dedire* (e), *Abbes v. Hodgson* (f), *Male v. Roberts* (g), *Inglis v. Usherwood* (h). There is also a large class of cases in which it has been held that the bankrupt laws of one country are to have effect in another, *Sill v. Worswick* (i), *Hunter v. Potts* (j), and *Richards v. Hodgson* there cited, *Potter v. Brown* (k), *Burrows v. Jemino* (l). In like manner in cases of intestacy the foreign law prevailing at the place of the intestate's domicile has governed the distribution of property in this country,

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(a) 2 *Hagg.* 58.(c) 1 *Dow.* 117.(e) 1 *P. W.* 429.(g) 3 *Esp.* 163.(i) 1 *H. Bl.* 665.(k) 5 *East*, 124.(b) *Russell & Ryan's C. C.* 237.(d) *Prec. in Cha.* 207.(f) 7 *T. R.* 241.(h) 1 *East*, 515.(j) 4 *T. R.* 182.(l) 2 *Str.* 733.

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Gordon v. Gordon (a), *Somerville v. Somerville* (b), *Brodie v. Barry* (c), *Ryan v. Ryan* (d), *Balfour v. Scott* (e).

Lastly, there are two cases which have been decided in the House of Lords bearing so strongly upon this, that although they are not precisely in point, yet they shew very clearly that had the present case been then under consideration, the decision would have been in favor of the legitimacy of the lessor of the plaintiff. *Shedden v. Patrick*, and the case of the *Strathmore* peerage. The former was originally decided in the court of session, and the judgment was affirmed in the House of Lords 1808. *W. Shedden*, of the city of *New York*, in *America*, entered into a regular marriage according to the law of *America*, with a woman who had previously borne to him two children, *William* and *Jane*, and he died a few days afterwards, leaving an estate in *Ayrshire*, not disposed of by will or other settlement. Such marriage had not the effect of rendering the children legitimate in *America*.

It was held that the son *William* could not inherit the *Ayrshire* estate, because his legitimacy or illegitimacy must be determined according to the laws of *America*, where his parents were domiciled and himself born, and by the laws of that country he was illegitimate (f). This case proves two things; first, that the consequences of the marriage depend upon the law of the country where it is solemnized; second, that a man cannot be a bastard in one country and legitimate in another. The principle of this decision was recognized by Lord *Eldon*

(a) 5 *Sessat.* 400.(b) 5 *Ves.* 750.(c) 2 *Ves. & B.* 127.(d) 2 *Phil.* 532.(e) 6 *Bro. P. C.* 560.

(f) This account of *Shedden v. Patrick* is taken from the printed case laid before the House of Lords in the *Strathmore* peerage case.

in *Gordon v. Gordon*, and in the case of the *Strathmore* peerage, where the son of the late lord, born in *England*, of parents domiciled in *England*, was held not to become entitled to the *Scotch* title and estates, by the subsequent marriage of his parents solemnized in *England*. Lord *Eldon* said he could discover no material difference between the case of the then claimant and that of *Sheddon*, and Lord *Redesdale* says, "The law that attached to him at his birth was the law of *England*;" and after referring to the case of *Sheddon v. Patrick*, he proceeds, "So I apprehend that this child was born illegitimate according to the law of the country in which he was born, according to the condition of his mother of whom he was born, and according to the state of his father, who was at the time a person unquestionably domiciled in *England*." The present lessor of the plaintiff, on the contrary, is legitimate by the law of the country where he was born, and by that law is not only considered legitimate now, but to have been so from his birth. His case is the exact converse of *Sheddon v. Patrick*, and the *Strathmore* peerage case; it follows, then, that had the claim in either of those cases been founded upon circumstances similar to those upon which the present case depends, that claim would have been established by the House of Lords.

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Courtenay contra. It appears from *Calvin's case* (a) that the right of inheriting *English* lands must be decided by *English* principles and *English* law. Foreign laws, and the decisions of foreign courts, cannot prevail. Innumerable inconveniences and difficulties would arise

(a) 7 Co. 1.

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if the courts of this country were to allow the law of the place, where any party may happen to be born, to decide the right of inheritance. According to the canon law, if a man, during the life of his wife marries another, if the second wife is in *bonâ fide*, that is, if she knows not of the impediment to the marriage, although the second marriage be void, her issue is legitimate (a). Suppose, then, a man in this country to have several daughters, and to go abroad where the canon law prevails, and enter into such a second marriage and to have a son; although legitimate in the country where born, yet surely he could not inherit lands here to the exclusion of the daughters. Suppose a man to enter into several marriages in a country where polygamy is allowed, each would be a good marriage there, but would each wife be entitled to dower? Or suppose the Pope were by dispensation to allow an incestuous marriage, would the issue be considered legitimate in this country? Take the converse of this, and suppose the case of a marriage between first cousins, in a country where that is prohibited, and where the issue would be considered illegitimate, would that prevent them from inheriting lands in *England*? The law of *possessio fratris*, &c. is peculiar to this country; but the son of a second marriage, born abroad, where no such rule prevails, would not, therefore, inherit lands in this country, to the exclusion of the sister of the whole blood. *John Voet*, b. 25. tit. 7. s. 4., mentions three modes of rendering legitimate those who were not so by birth. “*Per oblationem curiæ, per subsequens matrimonium, et per rescriptum principis.*” Now if a child, rendered legitimate *per subsequens matrimonium*, is to inherit lands in

(a) *Pothier Contrat de Marriage*, pt. 5, s. 4.

this

this country, why should not the same privilege be granted to those legitimate "per oblationem curiæ et per rescriptum principis?" Yet in the latter cases it would hardly be contended that the child can inherit. The whole argument on the other side rests upon the necessity of recognising in this country the personal status of any individual coming into it. But that cannot be done where it is contrary to the general spirit of our moral, religious, or political institutions. *Huber* and *Vinnius* describe slavery as a personal status, that accompanies a man every where: *Sommerset's case* (a) shews that such a status is not recognised here. The comity of nations, upon which reliance is now placed, could not obtain a recognition of the laws prevailing in one of our colonies, much less, then, should it have the effect, where the conflict is between the laws of *England* and those of an independent nation. The same reason exists for refusing to give effect to the law of *Scotland* now, that prevented the Court of King's Bench from recognising the laws of *Jamaica*. It is contrary to the spirit of our moral, religious, and political institutions. The statute of *Merton* is decisive. That was not only a refusal to make a new law, but a parliamentary declaration of the then existing law upon the subject. Lord *Coke*, in 2 *Inst.* 97., cites the following passage from *Glanville*, b. 7. c. 15. "Orta est quæstio si quis antequam pater matrem suam desponsaverat fuerit genitus vel natus, utrum talis filius sit legitimus hæres cum postea matrem suam desponsaverat. Et quidem licet secundum canones et leges Romanos, talis filius sit legitimus hæres, tamen secundum jus et consuetudi-

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(a) 20 St. Tr. 79.

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nem regni, nullo modo tanquam hæres, in hereditate sustinetur, vel hæreditatem de jure regni petere potest." He then adds " And herewith do agree, not only other ancient authors, but the constant opinion of the judges in all succession of ages ever since, of the ancient law of *England*;" for which he cites *Bracton*, b. 5. 416., *Fleta*, b. 6. c. 38, *Fort*, c. 39. 11 *Ass.* p. 20. Lord *Coke* afterwards mentions the case of *William* the Conqueror in a manner which shews, that in his opinion it made no difference whether the party was born and his parents married in a foreign country or in *England*. " Some have written that *William* the Conqueror being born out of matrimony, *Robert*, his reputed father, did after marry *Arlot* his mother, and that thereby he had right by the civil and canon law, but that is contra legem Angliæ, as here it appeareth." (a) He then says, that " Our common laws are aptly and properly called the laws of *England*, because they are appropriated to the kingdom of *England* as most apt and fit for the government thereof, and have no dependency upon any foreign law whatsoever, no not upon the civil or canon law, other than in cases allowed by the law of *England*." *Selden*, in his " *Dissertatio at Fletam*," c. 9. s. 2. gives two reasons which our ancestors had for not admitting the civil law into this country. " *Altera est, juris Cæsarei apud majores tunc nostros (quæ regimen publicum illud omnino spectaret) aperta et publica improbatio. Altera, juris Anglicani, quod commune vocitamus, ejusdemque principiorum, qua gentis hujus genio ab intimâ antiquitate adaptata sunt, singularis æstimatio, atque inde, nec immeritò, in eodem adhæsiò constans et sane pertinax.*" But if it

(a) Page 96,

were established that legitimacy is a personal status which accompanies a man every where, it would by no means follow, that a capacity to inherit lands is a personal status. The right to inherit is personal *sub modo*, that is, subject to the conditions and restrictions of the feudal law. *J. Voet* recognises several modes in which children illegitimate by birth may become legitimate; but in book 38. tit. "Digressio de feudis," s. 65. he says, "Jure tamen feudali nulli alii quam *legitime nati*, ad feudalem veniunt successionem, adeoque exclusi omnino naturales." Which shews that it is one thing to be legitimate, another to have a capacity to inherit. Inheritance in the feudal law is a new admission to the fee. All the incidents of that tenure, relief, primer seisin, &c. shew that it is not a personal but a mixed right, and a variety of instances may be cited which shew that the *lex loci rei sitæ* must regulate that right. By the common law of the land, the husband is not tenant by the curtesy unless there has been issue of the marriage; in the case of gavelkind lands that is not necessary. By the general law, the eldest son inherits the whole of the land, but gavelkind and borough-english lands descend in a different mode. And in all cases where there is a conflict of laws, the *lex loci* prevails. The result appears to be this, that feudal inheritance is a matter of contract, and every contract must be construed according to the laws of the place where it is to have effect. In *Madox, Form. Ang.* it is said, that feuds are made hereditary by the words "*hæredibus suis*." Now, hæres, according to Lord *Coke's* definition, is "*ex justis nuptiis procreatus*." No person who does not answer that description can be within the meaning of the contract, which must be construed as between the king and the subject, and therefore

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in favour of the former, (all feudal grants having been originally made by him,) who has a direct interest by reason of his right in case of escheats. He was then stopped by the Court, who called upon

Tindal to reply. The difficulties suggested as likely to result from the recognition of a foreign law in this case are merely imaginary. The supposed claim of dower by several wives married where polygamy is allowed, the imagined descent to a brother of the half blood, or to the son of a second wife who marries in bonâ fide during the life of the first, can have no application. They are in direct opposition to the laws of this country. The argument for the plaintiff only extends to the recognition of the status of marriage and of legitimacy, which are known to the whole of *Europe* where Christianity is professed. We do recognize the foreign marriage in this case, why not the consequences also? The case of legitimation by rescript has been put: the effect of that in the country where it takes place is merely to release to the bastard a part of the property which is forfeited to the prince. The passage from *J. Voet, Digressio de feudis*, has no application; it would prove too much; for, no doubt, the feudal law was applicable to *Scotland*, and yet persons not *legitime nati* inherit there if legitimated per subsequens matrimonium: or if it does apply, it proves that persons in the situation of the lessor of the plaintiff are in *Scotland* considered *legitime nati*. So also the passages cited by Lord *Coke* from *Glanville, Fleta*, and *Bracton*, merely relate to the laws of this country, and only establish that persons born in *England* before the marriage of their parents cannot be legitimated. The claimant's argument concedes that the eldest son ex justis nuptiis procreatus is to inherit; the

question is, which is that son? and that question must be answered by the laws of the country where the parties were domiciled, where the child was born, and where the marriage took place. The instances of gavelkind and borough-english, where the local law governs the course of descent, have nothing to do with the question. Here the course of descent is admitted, no attempt is made to apply the foreign law to that, but to ascertain who is the person answering the description of heir according to that course of descent. This is a question of fact to be decided by evidence of the foreign law in the same manner as in *Lollys's case*, *Dalrymple v. Dalrymple* (a), and *Ruding v. Smith* (b).

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ABBOTT C. J. The impression which I received upon the first reading of this case has not been altered by the argument. The simple question is, who is the heir to lands in *England*? The rule as to the law of the domicile has never been extended to real property, nor have I found in the decisions in *Westminster Hall* any dictum giving countenance to the idea that it ought to be so extended. Two decisions in the House of Lords have, however, been referred to, whence it is said such an opinion may be inferred; it is therefore satisfactory to me to know that this case may be carried before that tribunal. There being no authority for saying that the right of inheritance follows the law of the domicile of the parties, I think it must follow that of the country where the land lies. Personal property has no locality, and even with respect to that it is not correct to say that the law of *England* gives way to the law of a foreign country, but that it is part of the law of *England* that

(a) 2 Hagg. 106.

(b) *Ib.* 395.

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personal property should be distributed according to the *jus domicilii*. The question now to be decided is, whether a person having been born abroad can inherit land here, who would not have inherited had he been born in *England*. That the descent of land in *England* follows the law of the place where it is situate, appears by the various customs prevailing in different manors. Is there then any authority that the law of *England*, as to any lands in *England*, is to adopt the law of a foreign country? We are not altogether without an authority upon the subject. It appears by the statute of *Merton*, that the bishops were desirous of having that very law, for which the lessor of the plaintiff now contends, introduced into this country; but it was refused in language which has always been remembered and often repeated. That language, it is said, must be confined in its application to persons born in *England*; but the Crown had foreign possessions at that time, and persons born there were not aliens; and I see no reason for restraining the meaning of the passage in question in the manner contended for. Having that authority before me, and finding nothing in our law books to support a contrary doctrine (indeed in *Brodie v. Barry* (a) there is a dictum in favour of it) I think we shall not be warranted in giving effect to the *Scotch* law of legitimacy. It is not against our law that a foreign marriage, however solemnised, should be held good; we adopt the laws of all Christian countries as to marriage, but it by no means follows that we are to adopt all the consequences of such marriages which are recognised in foreign countries; it is sufficient if we admit all such conse-

(a) 2 Ves. & B. 127.

quences as follow from a lawful marriage solemnised in this country. For these reasons, I am of opinion that our judgment must be in favour of the defendant.

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BAYLEY J. I am entirely of the same opinion; I concede, that the *lex loci* governs the question of marriage; but whether all the consequences recognised in a foreign country, as following upon a marriage there, are also to be recognised in this country, is a very different question, and I think must be answered in the negative. In my judgment, the right to inherit land depends upon the quality of the land, and not upon any personal status. In this country there are many different tenures, and the question in each is, who is hæres, according to the law of *England*? If the land be of gavelkind tenure, it goes to all the sons alike; if borough-english, to the youngest son. What, then, is the descendible quality of lands held in socage; who is the hæres? We have no occasion to go beyond the statute of *Merton* in order to answer that question. The title of it is, "He is a bastard that is born before the marriage of his parents;" not restricting it to those born in *England*. After that, various statutes were passed to give to persons born out of *England* the same right of inheritance that they would have had if born within this country; such were the statute 25 *Edw. 3.* st. 2. and 7 *Anne, c. 5. s. 3.* The present ejectment is founded upon a claim of right which the lessor of the plaintiff could not have had if born within *England*. In stating descents in real actions, it is not sufficient to say that the land descended to "A, filio primo," you must add "et hæredi." No person can so describe himself whom the law of this country does not recognise as heir.

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heir. In *Co. Litt.* 7 *b.* a definition of hæres, as recognised by our law, is given; it is he ex justis nuptiis procreatus; the lessor of the plaintiff does not answer that description, and, consequently, cannot recover in this action.

HOLROYD J. It appears to me, that the question to be decided lies within a very narrow compass. The case must be determined entirely by the law of *England*. The case of *Dalrymple v. Dalrymple* certainly appears applicable to the present, but in my opinion it applies in favour of the defendant. Lord *Stowell* says, that the case being entertained in an *English* court, must be adjudicated according to the principles of *English* law. Upon the question of marriage, it is part of the law of *England* that the law of the country where the marriage is solemnised shall be adopted; and the same observation applies to the distribution of personal property, according to the law of the domicile. But no such principle applies to the inheritance of real property; to that the *lex loci* is alone applicable. And I take it, that legitimacy alone is not sufficient to make a person inherit socage lands, it must be legitimacy sub modo; the heir must be a child born after marriage. Foreign laws of descent are in no case adopted; the brother of the half-blood cannot inherit here, although he would in many foreign countries. Upon these grounds, I am of opinion that the defendant is entitled to our judgment.

LITLEDALE J. The rule is perfectly clear as to personal property; the *lex domicilii* governs its distribution; but that is on account of the ambulatory nature of the property. The reason is inapplicable to land,
and

and no such rule as to the inheritance of land can be found in our law books; it must therefore depend upon the law of the place where it is situate. One general rule applicable to every course of descent is, that the heir must be born in lawful matrimony. That was settled by the statute of *Merton*, and we cannot allow the comity of nations to prevail against it. The very rule, that a personal status accompanies a man every where, is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced. Here it would militate against our statute law to give effect to that status of legitimacy acquired by the lessor of the plaintiff in *Scotland*. He cannot, therefore, be received as legitimate heir to land in *England*.

Judgment for the defendant.

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WILSON *against* GEORGE.

Monday,
May 8th.

CRESSWELL had obtained a rule to set aside the judgment in this case upon the ground that the declaration was improperly filed de bene esse, the writ (a non-bailable latitat) being returnable on the 9th of *February*, the last general return day of *Hilary* term. On that day notice of declaration being filed de bene esse, was served, and the defendant was required to plead within eight days; and judgment was afterwards signed for want of a plea. The 12th of *February* falling on a *Sunday*, *Hilary* term ended on the 13th.

A plaintiff cannot declare de bene esse upon a latitat returnable on the last general return of a term.

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Coltman shewed cause, and contended that the rule of court *Trin.* term, 22 G. 3. sanctioned the course adopted in this case. The rule is, "that upon all process returnable before the last return of any term, where no affidavit is made or filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead within eight days after the filing or delivery thereof, provided the declaration be filed or delivered, and notice thereof given four days exclusive before the end of the term, and a rule to plead be duly entered." Now the last day of the term is the last return of writs of *latitat*; the process in this case was, therefore, returnable before the last return, and the declaration was filed, and notice thereof given four days exclusive before the end of the term.

Per Curiam. The declaration was improperly filed *de bene esse*. That the "last return" in the rule referred to, means the last general return, is plain, when you consider that it was made to enlarge the privilege of declaring *de bene esse* upon writs returnable on the first or second returns, which had been given by a former rule, *Mich.* term, 10 G. 2.

Rule absolute.

1826.

DOE on the Demise of GRUBB *against* J. GRUBB. *Monday, May 8th.*

A RULE had been obtained calling upon *E. Grubb*, the devisee of *J. Grubb*, the defendant in this action, which was an ejectment for lands in the parish of *Horsenden*, in the county of *Buckingham*, to shew cause why the lessor of the plaintiff should not sign judgment against the casual ejector, and issue execution thereon, unless the said devisee or the tenant in possession would appear and defend the action. It appeared by the affidavits that the lands in question descended to the lessor of the plaintiff in 1812, from his father, who had not been in possession since 1805. In 1814, he brought ejectment to recover possession, when *E. Grubb* appeared and was admitted to defend as landlord. Before the suit was ended, viz. in 1817, *E. Grubb* died intestate, leaving *J. Grubb* (then an infant) his heir at law. Negotiations were then entered into, but ultimately failed; and in 1820, the lessor of the plaintiff brought another ejectment, when *J. Grubb* appeared, and was admitted to defend as landlord. The lessor of the plaintiff filed a bill in the Exchequer for a discovery, to which the defendant made an insufficient answer, and soon afterwards went to *India*, where he remained until he was killed in battle in *May* 1825, when he left his brother *E. Grubb* devisee of all his real property, whereupon the lessor of the plaintiff, finding that the statute of limitations would be a bar to a new ejectment, made this application.

Where, in ejectment, *A.* was admitted to defend alone, as landlord, and died before the termination of the action, having devised all his real estates to *B.*, and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the Court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless *B.* would appear and defend the action as landlord.

The

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DOX dem.
GAUSS
against
GAUSS.

The Court after hearing *Parke* against the rule, and *Scarlett* and *Patteson* in support of it, thought it was but reasonable to grant the leave desired, inasmuch as the lessor of the plaintiff had not been guilty of any wilful delay in the prosecution of his claim.

Rule absolute.

Monday,
May 8th.

GRAY against Cox.

Where the Court, after verdict for the plaintiff, granted a new trial without mentioning the costs, and the plaintiff discontinued. Held, that the defendant was not entitled to the costs of the trial.

THE plaintiff in this case originally obtained a verdict in his favour, but a new trial was afterwards granted, and nothing said about costs; and the Court having, in *Trinity* term, 6 G. 4., refused to allow the plaintiff to amend his declaration unless upon the terms of paying the costs of the former trial, he discontinued. Whereupon the master in his taxation of costs allowed the defendant the costs of the former trial. A rule having been obtained for the master to review his taxation,

Campbell shewed cause, and contended, that according to the case of *Jackson v. Hallam* (a); the defendant was entitled to the costs of the former trial, inasmuch as the plaintiff had thought fit to abandon the suit; and that the present case was stronger in favour of the allowance than that which was cited, for costs upon discontinuance are allowed by statute 8 *Eliz. c. 2*.

J. L. Adolphus, contra, was stopped by the Court.

Per Curiam. It has in many cases been considered as a settled rule that a party can never have the costs of

(a) 2 B. & A. 517.

a trial in which he has been defeated, *Trelawney v. Thomas* (a), *Austen v. Gibbs* (b). Suppose then the cause had gone to a second trial, and the defendant had succeeded, he could not have obtained the costs of the former trial. That being the practice of the Court, it is difficult to find a reason why the defendant should be in a better situation because the plaintiff does not choose to have the cause tried a second time, indeed, *Howarth v. Samuel* (c) is an express authority against him. The decision in *Jackson v. Hallam* (d), proceeded on the ground that the plaintiff, who gained the verdict on the first trial, was ultimately successful. It appears, therefore, that the Master's taxation in this case is not correct, and ought to be reviewed.

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 against
 COM.

Rule absolute.

(a) 1 H. Bl. 641.

(b) 8 T. R. 619.

(c) 1 B. & A. 566.

(d) 2 B. & A. 317.

The KING *against* GUDRIDGE and Others.

 Monday,
 May 8th.

A RULE had been obtained for quashing a writ of certiorari quia improvide emanavit. The writ issued under the following circumstances: An appeal against an order for the allowance of the accounts of the defendants as churchwardens and overseers of the poor of the parish of *Cosheston*, in the county of *Pembroke*, was entered and respited at the *Midsummer* quarter sessions, and came on to be heard at the *Michaelmas* sessions, when the order for the allowance was quashed. The attorney for the respondents requested to have a case for the opinion of this Court, but a majority of the justices

Upon an appeal against an order for the allowance of overseers' accounts, a magistrate, a rated inhabitant of the parish, cannot vote either on the determination of the appeal, or on a question as to granting a case for the opinion of this Court.

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tices present thought it ought not to be granted. After some of them had left the court, a case was again applied for, when three magistrates voted for a case, and two against it. One of the three was a rated inhabitant of the parish of *Cosheston*, and had on that account refused to vote on the decision of the appeal. A case was afterwards drawn up without the concurrence of the appellant or his attorney, and together with the order of sessions was removed into this Court by certiorari.

Brodrick shewed cause. The real question is, whether the case was properly granted at the sessions. If the magistrate, who was a rated inhabitant of *Cosheston*, had a right to vote, there can be no doubt that the case was properly granted, and if so the certiorari to remove the order into this Court would issue as a matter of course. Now the vote of the justice objected to was against his own interest. The stat. 16 G. 2. c. 18. s. 3. prevents justices from acting in the determination of any appeal to the quarter sessions from any order relating to the parish where they are charged or chargeable. But here the appeal was determined before the case was applied for, the statute is therefore inapplicable.

Campbell and *E. V. Williams* contra. Even if the act of parliament did not apply, it would by the common law be illegal for any person to act as judge in his own case, *Parish of Great Charte v. Kennington (a)*, *Rex v. Yarpole (b)*. The 16 G. 2. c. 18. did not disable justices from acting where they might have done so before; on

(a) 2 Str. 1173.

(b) 4 T. R. 71.

the contrary, it gave them power to act in certain cases, but to prevent doubts as to the extent of the power so given, provided that they should not act in the determination of appeals against orders affecting parishes in which they were rateable. Besides, here the magistrate, whose vote is disputed, did act in the determination of the appeal; for the case granted by the Court became a part of the order of sessions made on hearing the appeal.

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ABBOTT C. J. We think it the safer course to hold that magistrates should not interfere in cases where they are interested, and that the rule for quashing the writ of certiorari must be made absolute.

Rule absolute.

The KING *against* The Inhabitants of LLANTILLIO GROSSENNY, MONMOUTHSHIRE. (a)

UPON an appeal against an order of two justices, whereby *W. Edwards*, his wife, and children, were removed from the parish of *Saint Peter*, in the county of *Hereford*, to the parish of *Llantillio Grossenny*, in the county of *Monmouth*, the court of quarter sessions confirmed the order, subject to the opinion of this Court on the following case :

After *A.* had been in possession twelve months, he sold the property for 40*l.* to *C.*, to whom he gave up possession. *A.* afterwards paid the remainder of the purchase-money to *B.* : Held, that *A.* did not gain any settlement by the purchase of any estate or interest within the statute 9 G. 1. c. 7. s. 5.

A. made a parol agreement with *B.* for the purchase of a cottage and garden for 40*l.* *A.* took possession, and paid 30*l.* on account, and resided upon the premises. No conveyance was executed.

(a) Three of the Judges of this court sat, as on former occasions, from Tuesday the 9th to Saturday the 13th of May inclusive. During that period this and the following cases were argued and determined.

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W. Edwards was born in the parish of *Llantillio Grossenny*, and he also gained a settlement in that parish by hiring and service. The parish of *Llantillio Grossenny* relied on shewing a subsequent settlement in a third parish, namely *Skenfretth*, in the county of *Monmouth*. In 1816 the pauper made a parol agreement with one *Ann Carter* for the purchase of a cottage and garden in the parish of *Skenfretth*, for the sum of 40*l.* Under this contract he took possession and paid *Ann Carter* 30*l.* on account; no conveyance was ever executed. After the pauper had been in possession twelve months, living and sleeping in it with his wife and children, he sold the property for 40*l.* to *S. Watkins*, to whom he gave up possession, and afterwards paid the remaining 10*l.* to *A. Carter*. The pauper was never in possession of the premises after he had paid the whole of the purchase-money. *S. Watkins* is now in the possession of the cottage and garden. The question for the opinion of this Court was, whether the pauper gained a settlement in *Skenfretth*.

Nolan, in support of the order of sessions, relied upon *Rex v. Long Bennington* (a) and *Rex v. Geddington* (b), as decisive authorities to shew that the pauper did not gain any settlement by the purchase of any estate or interest within the statute 9 G. 1. c. 7. He was then stopped by the Court.

Maule and *Watson*, contra. This case is distinguishable from the cases cited. In *Rex v. Geddington* (c), by

(a) Cited by *Bayley J.* in *Rex v. Geddington*, 2 B. & C. 132.

(b) 2 B. & C. 129.

(c) 2 B. & C. 129.

the terms of the contract, the purchase-money was to be paid, and the conveyance was to be executed on a particular day. In this case no time was fixed for payment of the purchase-money, or for making the conveyance. In *Rex v. Geddington* the pauper could not call for any conveyance before the day appointed. Here the pauper was let into possession, and might immediately, on paying the 10*l.*, have demanded a conveyance. There the residue of the purchase-money was never paid, but the contract was rescinded. Here, the residue of the purchase-money was paid, and the contract was ultimately performed. During the whole time the pauper resided on the premises he had an equitable estate upon condition, the condition being the payment of the residue of the purchase-money. When that condition was performed, he acquired an equitable estate by relation, from the time when his occupation commenced.

BAYLEY J. It is very desirable to adhere to the language of the act of parliament, and to the construction put upon that language in decided cases. The statute 9 G. 1. c. 7. s. 5. enacts, "that no person shall be deemed to acquire or gain any settlement in any parish, for or by virtue of any purchase of any estate or interest in such parish, whereof the consideration for such purchase doth not amount to the sum of 30*l.* *bonâ fide* paid." There must, therefore, be a purchase of an estate or interest, and by the latter word must be understood some specific definite interest, and the party contracting must become the purchaser. *Rex v. Long Bennington* (a) and *Rex v. Geddington* (b) establish, that although

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(a) 2 B. & C. 132.

(b) 2 B. & C. 129.

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an equitable estate is sufficient to give a settlement, still the purchase must be completed; and that if it be not an estate, but an equitable right only, no settlement is gained. The principle deducible from those cases is, that the relation of trustee and cestui que trust must be created, in order to give a settlement by the purchase. In *Rex v. Geddington* the agreement was to purchase an estate for 310*l.*, of which 160*l.* was to be paid on the 30th November, and 150*l.* on the 24th June then next. The latter sum was never paid; the pauper resided a year and a half, and afterwards the contract was rescinded. There, by paying 150*l.*, a perfect equitable estate would have been acquired, but it was never paid, and therefore the pauper was held never to have had a perfect equitable estate. Here the pauper had paid 30*l.*, and by paying 10*l.* more he would have performed all he was bound to do, and would have acquired a perfect

equitable estate. During the whole time the pauper was in possession in this case he might have been removed. He never was the purchaser of an estate or definite interest. It has been ingeniously argued, that the payment of the 10*l.* would have given the purchaser a right to demand a conveyance; and that as it might have been made at any time, the payment, when made, related back to the time when the occupation began; and, therefore, that the estate by relation was the estate of the purchaser, from the time when his occupation commenced. I think, however, that for the purpose of gaining a settlement, such a payment did not give him the estate *ab initio*, but only from the time when the payment was actually made. The expression of my Brother *Holroyd*, in *Rex v. Geddington (a)*, as to the vendee having acquired a settlement by having paid or offered

offered to pay the remainder of the purchase-money, must be understood in that sense.

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HOLROYD J. I think there is no distinction between the cases of *Rex v. Bennington* and *Rex v. Geddington (a)*, and the present case. The pauper in this case never was in possession of the estate after he had paid the 10*l*. He therefore never came to settle upon his own estate. A tender of the purchase-money perhaps might have been equivalent to payment on the principle that an offer to perform is equivalent to actual performance; but then in that case, in order to give a settlement, the purchaser at the time of the tender must have had a right to continue to hold the premises. Here, at the time when the payment of the residue was made, the purchaser had no right to hold the possession of the premises.

LITLEDALE J. concurred.

Order of sessions confirmed.

(a) 2 B. & C. 129.

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The KING *against* The BRIGHTON Gas Light
and Coke Company.

By an act of parliament a company was established for lighting the town of *B.* with gas, and they were authorised, with the consent of certain commissioners (appointed under another act of parliament passed for lighting and paving the town of *B.*), to break the ground, and lay their pipes in the streets of *B.* The company having so laid their pipes for the purpose of conveying the gas, were held to be rateable to the poor in respect of the land occupied by their pipes, and to the extent of the increased value of the land in consequence of its being used by them for the purpose of conveying the gas.

UPON appeal against a rate for the relief of the poor of the parish of *Brighton*, made upon the *Brighton* Gas Light and Coke Company of the sum of 6*l.* for and in respect of the mains or pipes and other apparatus for the conveyance of gas belonging to the company, situate, being, and *fixed* in the ground in the parish of *Brighthelmstone*, the court of quarter sessions confirmed the rate, subject to the opinion of this Court on the following case:

The company was established by statute 58 G. 3. c. xxxvii. entitled "An act for lighting with gas the town of *Brighthelmstone*, in the county of *Sussex* (*a*)," which

(*a*) Section 42. recited, that for the purpose of using the gas for lighting the public streets, &c., it would be requisite that the gas should be conveyed by means of pipes or tubes to be properly laid for that purpose, and enacted, that if at any time the commissioners (under a former act for paving and lighting *Brighton*), should think it fit to contract with the company to light the public streets, &c. in the town of *Brighton*, it should be lawful for the company and their successors under the direction and inspection of such commissioners, or of their surveyor, to break up the soil and pavements of any such streets, and to dig and sink trenches and lay pipes, and from time to time, under such direction and inspection, to alter the position of, and repair and relay such pipes, &c.

Sect. 43. enacted, that it should not be lawful for the company, or their servants, to break up the soil or pavement of any of the streets, &c. belonging to, or paved or repaired by or under the direction of the commissioners, without the consent in writing first had and obtained of the commissioners, to be signified under the hand of their clerk; nor to enter upon or break up any pavement or soil of any public or private street,

which is declared a public act. The buildings and manufactory are in the parish of *Rottingdean*; the mains or pipes forming the subject of appeal, are in the parish of *Brighthelmstone*, placed in the ground, and covered over. The gas is sold in *Brighthelmstone*. It is a manufactured article, and the profits of the manufactory arise from the sale of gas and coke, of which the gas is conveyed in mains or pipes, and the coke in carts. The mains and pipes within the parish of *Brighton* produce no profit but by conveying gas. They are worth 360*l.* per annum, at the least, to any person who could use them for that purpose, and it was further proved by the testimony of a witness, that he would be willing to give 400*l.* per annum for them, taking all chances both at law and in fact as to the mode in which he might employ them, but that he formed his calculation upon a moral certainty of being able to employ them for conveying gas. The expence of putting them down amounted to 10,000*l.* or upwards, and the sum of 40*l.* per annum at which the mains or pipes are assessed,

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street, &c., being the property of or belonging to any body corporate, or any other person, without the consent in writing first had and obtained of such body corporate, or the respective owners for the time being.

Sect. 46. enacted, that the company might, under the direction and inspection of the commissioners, or their surveyor, break up the soil or pavement of any of the streets, &c., and sink trenches, and lay any main or pipe, to communicate with the works of the company, under, across, and along any of the streets, &c. requisite for the supply of any dwelling-house, &c., or carrying into execution the powers thereby granted, and erect any machine or other apparatus requisite for securing to such dwelling-house, &c. a competent supply of gas, and also to alter the position of, repair, relay, or amend any pipes, although no contract might have been entered into with the commissioners for lighting any public street, &c. in the parish or place where such houses should lie or be situate.

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Marryat and *Courthope* in support of the order of sessions. The question is, first, whether property of this description is liable to be rated to the relief of the poor. Secondly, whether it is liable to be rated to the extent to which it has been rated in this case. Where a party has the exclusive use of any part of the soil for the purpose of conveying water or any other subject matter, he is rateable to the relief of the poor in respect of the land so occupied. In *Rex v. The Birmingham Gas Light and Coke Company (a)*, the question was not as to the rateability of the company, but merely as to the quantum, but unless there be a distinction between pipes conveying gas and pipes conveying water, *Rex v. The Corporation of Bath (b)*, and *Rex v. The Rochdale Water Works Company (c)*, are authorities expressly in point to shew that this property was rateable. Here the company use the land for the purpose of conveying gas, and they have the exclusive enjoyment of that part of the land in which their pipes lie; they are, therefore, rateable. The next question is, whether they are liable to be rated to the extent of the increased value of the land so occupied. The rate here is upon the land, but the pipes are connected with the freehold, and form part of it. Now it has been decided, that a party is rateable in respect of the increased annual value, although that annual value be derived from the annexation of a personal chattel, as

(a) 1 B. & C. 506.

(b) 14 East, 609.

(c) 1 M. & S. 634.

a weighing machine, *Rex v. St. Nicholas, Gloucester* (a); or from a machine not fixed to the freehold, as in the case of the carding machine, *Rex v. Hogg* (b).

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Adams Serjt., Long, and Doughty contra. The company are not rateable. First, they are not occupiers of land within the parish. Secondly, assuming that they are rateable, they are rateable only in respect of the land occupied by them, and not in respect of their pipes. The company are not occupiers of any land. They have not any control over the soil. The only land they occupy is in the parish of *Rottingdean*, where their manufactory is situated; there they ought to be and are rated. They cannot even break the ground to lay down their pipes, without the consent of the commissioners. They have only a special licence, and cannot use the pipes for any purpose but the conveyance of gas. This case differs, therefore, from that of *Rex v. Corporation of Bath*, for there the water company were entitled to, and had the full control over the land itself. But, secondly, assuming that the company are rateable, they are rateable only in respect of the land occupied by them, and not in respect of their pipes; the pipes may be removed by the company at any time. They do not, therefore, constitute part of the freehold; they are merely a mode of conveyance for a manufactured article: and this is a mode of using the public way.

BAYLEY J. To make property rateable it must come within the words of the statute 43 *Eliz.* The only question in this case is, whether the company can be deemed occupiers of land, and to the extent to which they are

(a) *Cald.* 262.(b) *Cald.* 266.

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rated. The company are empowered, by an act of the 58 G. 3., with the consent of the commissioners for paving and lighting the town of *Brighton*, to break up the soil of the streets and roads, dig and sink trenches, and lay pipes, and to alter the position of, and to repair and relay such pipes. If it were doubtful in this case, whether the pipes constituted part of the freehold, the company would, at all events, be liable to be rated for an occupation way; but I think that we may collect from the case, that the pipes are fixed in the soil; and if so, then *Rex v. The Corporation of Bath* (a) establishes that they are to be deemed occupiers of that land in which the pipes are fixed. *Rex v. The Rochdale Water Works Company* (b), and *Rex v. The Birmingham Gas Light and Coke Company* (c) establish the same principle. In the latter case, part of the apparatus used for the manufacture of gas and coke was affixed to the freehold, and part was not, and it was held that the company were liable to be rated to the extent of their occupation of land, and that the branches and pipes were to be considered part and parcel of the land. In the case of a canal the proprietors are rateable, not only in the parish where the tolls are collected, but in each parish where they occupy land for the purposes of their canal. In many acts of parliament authorising the making of a canal, it is provided, that the company shall not be rated at a higher rate than the adjoining land; but if there be no such provision, then they must be rated in respect of the value which the land has acquired, from its having been used for the purposes of the canal. There is no such provision in this case; and as the pipes are laid down so as to be-

(a) 14 East, 609.

(b) 1 M. & S. 634.

(c) 1 B. & C. 506.

come

come part and parcel of the land for the time they remain, they thereby improve the value of the land in the same manner as buildings erected upon the land, and the whole must be rated accordingly. I entertained some doubt at one time whether the right of the company to remove the pipes might not prevent their being rateable in respect of the increased value of the land; but upon reflection it appears to me, that that makes no difference, because they must be rateable upon the same principles as buildings are which may be removed at the end of the term. There are cases which, in principle, are similar to the present. Thus, a person who had the exclusive occupation of a waggon-way, and not a mere right of passage, has been held to be rateable. Upon these grounds I am of opinion, that this property is rateable. Secondly, that it is rateable to the extent of the value of that which for the time constitutes part of the freehold. Thirdly, I am of opinion, that the rate is properly made in *Brighton* and not in *Rottingdean*, because the rate must be upon the land occupied by the company, and here the land occupied is in the parish of *Brighton*.

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HOLROYD J. I am of opinion that the gas company are liable to be rated in respect of this property, and that they are liable to be rated in respect of the increased value of the land. The first point is decided by many cases which are similar in principle to the present. In one case it was held, that a weighing machine affixed to a building was liable to be rated, on the ground that the land and building constituted one entire thing, and that the house was much more valuable from the machine being appurtenant thereto, *Rex v. St. Nicolas Gloucester*.

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ter (a). In another case it was held, that where a carding machine was demised with a building, but not fixed to it, but forming one entire subject, the rate being on the building, that was properly rated for the entire profits, the house acquiring a greater value from the use to which it was put, *Rex v. Hogg* (b). I think, therefore, that so long as the company used the land for the purpose of their pipes they are rateable, for they have the exclusive occupation of that part of the land in which their pipes lie; and that they are rateable for the entire profits of that land, part of them arising from the gas pipes placed in the land.

LITTLEDALE J. The rate must be upon the land. Here, the pipes being fixed to the land, the land and pipes are to be considered as one entire thing. The only difficulty in the case is, whether the company are to be considered as occupiers of land. They are authorised, with the consent of the commissioners mentioned in the act of parliament, to break the soil for the purpose of laying their pipes. Now, in *Dyson v. Collick* (c) it was held, that the contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close across a stream there for the purpose of completing their work, had a possession sufficient to entitle them to maintain trespass against a wrong doer. This is an authority to shew that the company were virtually in the occupation of this land, and being in the exclusive occupation of that portion of land in which their pipes lay, they are rateable within the principle laid down in *Rex v. The*

(a) *Cald.* 262. (b) *Cald.* 266. 1 *T. R.* 721. (c) 5 *B. & A.* 600.

Corporation of Bath (a), and Rex v. The Rochdale Water Works Company. (b)

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Order of sessions confirmed.

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(a) *Cald.* 262.(b) 1 *M. & S.* 634.

The KING *against* The Inhabitants of ST. PETER
THE GREAT in the County of WORCESTER.

ON the 4th of *June* 1825, the churchwardens and overseers of the poor of the parish of *Saint Peter the Great*, in the county of *Worcester*, made a rate for the relief of the poor, in which the company of proprietors of the *Worcester and Birmingham Canal Company* were rated for land for wharfs, basin, warehouses, engine-house, lock-house, gardens, and premises, and for tolls and profits arising therefrom, 11*l.* 4*s.* 5*d.* Upon appeal, the court of quarter sessions amended the rate, by reducing the sum of 11*l.* 4*s.* 5*d.* to the sum of fourteen shillings and one halfpenny, and

By a canal act of the 31 *G. 3. c. 31. s. 77.* it was enacted, that the company should be rated to all parochial taxes in respect of their lands, &c., in the same proportion as other lands lying near the same should be rated, and as the same lands would be rateable in case the same were the property of in-

dividuals in their natural capacity. By a subsequent act of the 38 *G. 3. c. 31. s. 20.* It was enacted that the company should be rated to all parochial taxes in respect of the lands used by them for the purposes of the said navigation, in the same proportion as other lands and buildings adjoining or lying near the canal should be rated; but it was further enacted, that it should be lawful for the company to agree with any owner of lands adjoining their lands, taken for the purpose of the said navigation, for an exemption from all rates and taxes in respect of such lands, and for charging the same upon the adjoining lands of such persons, and in all such cases the parochial taxes, rates, &c. which might be thereafter charged upon or payable in respect of the lands so taken for the purposes of the said navigation, should be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof, and the lands of the company should be exempted and discharged therefrom:

Held, first, that by the 31 *G. 3. c. 31. s. 77.* the company were not liable to be rated for the land used for the purposes of the canal according to its improved value.

Held, secondly, that the seventy-seventh section of the 31 *G. 3.* was not repealed by the twentieth section of the 38 *G. 3.*, and that the company were not liable to be rated for the improved value of the land.

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confirmed the rate so amended, subject to the opinion of this Court on the following case (a):

By an act of the 31st G. 3. it is enacted, that the said company of proprietors shall from time to time be rated to all parliamentary and parochial taxes and assessments for and in respect of the lands and grounds to be purchased or taken, and all warehouses or other buildings to be erected by the said company of proprietors in pursuance of this act in the same proportion as other lands, grounds, and buildings lying near the same are or shall be rated; and as the same lands, grounds, and buildings so to be purchased or taken and erected would be rateable in case the same were the property of individuals in their natural capacity. And by an act of the 38th G. 3. for amending and enlarging the powers of the 31st G. 3., after reciting that the said last mentioned act had in some respects been found defective, and the exercise of some of the powers and provisions thereof, as therein directed, inconvenient, it is enacted, that the said company of proprietors shall from time to time be rated to all parliamentary and parochial taxes, rates, and assessments, for and in respect of the lands and hereditaments taken and used by the said company for the purposes of the said navigation; and all warehouses and other buildings erected or to be erected thereon by the said company of proprietors by virtue of the said act, and of this present act, in the same proportions as

(a) By another rate made for the relief of the poor of the same parish in the city of Worcester, the company were rated for five acres, three roods, and thirty-seven perches of land, being the canal and towing-path from *Diglis* to *Chopgate Bridge*, and the tolls and profits arising therefrom, *£l. 8s. 5d.* Upon appeal against this rate, the sessions amended the same by reducing the sum of *£l. 8s. 5d.* to *13s. 10d.*, subject to the opinion of this Court on a case precisely similar to the first.

other

other lands, grounds, and buildings adjoining or lying near the said canal are or shall be rated; but it shall be lawful for the said company to agree with any owner or owners of any lands or hereditaments of sufficient yearly value adjoining or lying near to the lands or hereditaments to be purchased or taken for the purpose of the said navigation, for an exemption from all rates and taxes in respect of such last mentioned lands and hereditaments, and for charging the same upon the adjoining lands and hereditaments of such person or persons; and in all such cases all the parochial and other taxes, rates, charges, and assessments which might be thereafter charged upon or payable in respect of the lands or hereditaments to be so purchased or taken for the purposes of the said navigation, shall be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof; and the lands and hereditaments to be purchased for the purpose of the said navigation, shall be exempted and discharged therefrom. And it is in the same act further enacted, that all parochial rates and assessments which shall or may at any time be laid, assessed, or imposed upon the rates and personal estate of the said company of proprietors shall be laid, assessed, or imposed in each parish, township, hamlet, or place respectively, in proportion to the length of the said canal, in each respective parish, township, hamlet, or place, and not otherwise. And also in the same act it is enacted, that the said act of the 31 G. 3., and all and every the clauses, articles, provisions, matters, and things therein contained (except such and so many of them or such parts thereof as are altered, varied, explained, or amended by this act) shall extend and be applicable to the present act, and the powers,

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powers, provisions, and directions hereof, in so far as the same are compatible herewith. The question for the opinion of the Court was, whether the land used for the canal was to be assessed at the same rate as the adjacent lands, or whether the profits derived from the tolls were to be included in the rateable value. If the Court should be of opinion, that the land so used is to be assessed at the same rate as the adjacent lands, then the rate was to stand as amended by the court of quarter sessions; but if the Court were of opinion that the profits derived from the tolls were to be included in the rateable value, then the rate was to be amended by inserting the sum of 11*l.* 4*s.* 3*d.*, instead of 14*s.* and one halfpenny.

Russell (and *Ryan* was with him) in support of the order of sessions. *Rex v. The Grand Junction Canal Company* (a), is a decisive authority to shew that, under the statute 31 G. 3. the company were liable to be rated for their lands at the same value as other adjacent lands, and not according to the improved value derived from the land having been used for the purposes of the canal. (He was then stopped by the Court.)

Campbell and *Godson*, contra. The 77th section of the 31 G. 3. which enacts, "that the company shall be rated for their land in the same proportion as other lands, and as the same would be rateable if they were the property of individuals in their natural capacity," does not import that the tolls are not to be taken into consideration in fixing the rate. It is confirmatory of what

(a) 1 B. & A. 289.

the common law would have directed, viz. that the rate shall be equally laid upon all the property assessed. If the legislature had intended to exempt the tolls, the language of the act would have been similar to that of the acts for making the *Leeds* and *Liverpool* canal (a). There the tolls are expressly exempted from the payment of any rates other than such as the land which should be used for the navigation would have been subject to if those acts had not been made. But assuming that the 77th section of the 31 G. 3. did exempt the company from being rated in respect of the improved value of the land, that section is virtually repealed by the 20th section of the 38 G. 3. which enacts, "that the company shall be rated for their lands in the same proportion as other lands," omitting the other very material words in the 31 G. 3., viz. as the same would be rateable if they were the property of individuals in their natural capacity. The words thus omitted may be considered as struck out of the 31 G. 3., and then the fair construction of the clause is, that the land held by the canal company should be rated as other adjoining lands are, viz. in proportion to their value taken as land only.

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BAYLEY J. This case is perfectly clear. It is in effect decided by *The King v. The Grand Junction Canal Company* (b), *Rex v. St. Mary's Leicester* (c). These cases establish this principle, that unless there is some clause of exemption in the act of parliament, land taken for the purpose of a canal will be rate-

(a) 5 East, 325.

(b) 1 B. & A. 289.

(c) Trinity term, 57 G. 3.

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able not according to the value of the land when it was taken for the purposes of the canal, but according to that value which it has acquired from its having been used for the purposes of the canal. But canals are supposed to be of public benefit, and, therefore, some of the acts of parliament, under the authority of which canals have been made, have clauses of exemption, so as to leave land upon the same footing in this respect, as it was when first taken for the purposes of the canal. It is conceded that the language of the 31 G. 3. is not distinguishable from that of the 34 G. 3. in the case of the *King v. The Grand Junction Canal Company* (a). It has been argued, that the true construction of this clause is, that the rates are to be equally laid upon all the property assessed, and that it is only confirmatory of the common law in that respect; but, in construing acts of parliament, we are bound to give statutable effect to the words used in them, and so construing them, I think the effect of that clause is to exempt the company from being rated in respect of the increased value of the land, derived from its having been used for the purposes of the canal. But it is said that the 77th section of the 31 G. 3. is virtually repealed by the 20th section of the 38 G. 3., and that the latter statute places the company in the same situation as if the former act had not passed, and makes land taken for the purpose of the canal liable to be rated according to its increased value. Now, if the legislature had intended to repeal that clause by the 38 G. 3., it would have been very easy to have done so by a clause stating specifically, that lands taken for the

(a) 1 B. & A. 289.

purposes of the canal should be rated according to their improved value. It may fairly be concluded, that if the legislature had contemplated any change of purpose in this respect, they would have expressed that intention in clear and unambiguous language. It seems to me, that the latter part of the 20th section of the 38 G. 3. puts this beyond all doubt. It gives power to the canal company to make specific bargains for the purchase of lands exempt from rates, and to shift the rates from lands taken by the company, and to place them upon certain other lands in the hands of individual proprietors. In that case the value, at the time of the sale, must remain the rateable value, and there is no reason for supposing that a different rate would be payable if the company made no such bargain.

Order of sessions confirmed.

MERCERON *against* DOWSON.

COVENANT upon an indenture, whereby certain premises were demised to *J. N.* for ninety-nine years. The declaration averred, that all the interest of *J. N.* in the demised premises, came to and vested in the defendant by assignment; and that afterwards, and during the term, to wit, on the 1st *January* 1820, and thence hitherto, the premises were and have been out of repair

Where, in covenant against an assignee of a lease, the plaintiff declared that all the right, &c. of the lessee vested in the defendant by assignment, and that afterwards the premises were out

of repair, and defendant pleaded in bar, that for one period he was possessed of one sixth of the premises, as tenant in common with *A.*, *B.*, and *C.*, and for another period, of one third, as tenant in common with *B.* and *C.*, and that no more or greater interest in the premises ever came to him by assignment: Held, that the plea was bad in substance, as it could not be a bar to the whole action; that it was bad in form also, as it merely confessed that defendant had possession of part of the premises, and not that he was assignee. Semble, that the defendant should have pleaded in abatement, and should have shewn how the other persons became tenants in common with him.

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contrary to the covenant, &c. Pleas, First, non est factum. Secondly, that all the interest of *J. N.* did not come to and vest in the defendant, as alleged. Issue thereon. Thirdly, *actio non*, because before the 30th day of *December* 1819, to wit, on the 5th day of *August* 1817, defendant became, and from thenceforth continually until the day and year hereinafter next mentioned was, possessed of and in one undivided sixth part only of and in the said demised premises, with the appurtenances, to wit, as tenant in common with one *J. D.* and *T. O.* and *W. D. D.*, and that he the said defendant afterwards, to wit, on the 23d day of *February* 1824, became, and from thenceforth until the day of commencing this suit was, possessed of and in one undivided third part only of and in the said demised premises, to wit, as tenant in common with one *W. D. D.* and *T. O.*; and that he the said defendant had not by assignment or otherwise, at the time of the commencement of this suit, or at any time theretofore, any greater estate, right, title, &c. share or shares of and in the said demised premises than as in this plea aforesaid. And this the defendant is ready to verify, wherefore he prays judgment, if the plaintiff ought to have or maintain his aforesaid action thereof against him. Demurrer and joinder.

Comyn in support of the demurrer. This plea in its present form is bad, either as a plea in abatement or in bar. The facts alleged in the plea do not constitute a bar, and although they might be sufficient ground for a plea in abatement, yet the form is insufficient. First, the plea is pleaded in bar, and not in abatement; secondly, if pleaded in abatement, it should have shewn how the defendant

defendant became tenant in common with the other person named, *Com. Dig. Abatement* (F. 6.) pl. 4. It would be very hard upon the plaintiff to hold that such a plea is good in bar. He cannot be supposed to know the particulars of the defendant's title. *Congham v. King* (a) may be cited to shew that the plaintiff might have declared against the defendant in respect of his share of the premises, but that related to a divided portion; here the defendant admits that his is an undivided share. Neither is *Stevenson v. Lambard* (b) any authority for the defendant. That proceeded entirely on the authority of *Congham v. King*; and, indeed, proves that to an action of debt for rent, eviction as to part cannot be pleaded in bar of the whole action.

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J. L. Adolphus contra. The plaintiff charges the defendant as privy in estate with the first lessee, and in order to do that, says, that all the estate, &c. vested in the defendant, who, by the plea in question, says in substance, that no more than one third ever came to him. In *Hare v. Cator* (c) it was held, that the assignee of a part must be charged according to the truth of the case, and the defendant having been charged as assignee of the whole of the premises demised, when in truth he was assignee of part only, a nonsuit was entered. In *Gamon v. Vernon* (d), and *Congham v. King*, the party was charged according to the truth of the fact, being sole assignee of part. On covenants for rent, tenants in common may sue and be sued separately; but in *Kitchen and Another v. Buckley* (e) cited in *Bac. Abr.*

(a) *Cro. Car.* 221.(b) 2 *East*, 575.(c) *Comp.* 766.(d) 2 *Lev.* 231.(e) 1 *Lev.* 109.

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Joint Tenants (K), it was held, that tenants in common might and ought to join in suing the assignee of a tenant for neglecting to repair, and that the covenant being indivisible, the wrong and damages could not be distributed, because uncertain. And since for this reason, one tenant in common cannot sue alone, so neither can he be sued alone for breach of a covenant to repair. Nor is he bound to plead in abatement, for he does not necessarily know who the other tenants in common are.

BAYLEY J. I have no doubt that this plea is bad. The covenant to repair is a charge upon the estate. When an estate is divided, that is done, either so as to pass separate portions to separate owners, or to pass undivided interests. The division in this case was of the latter description. Then the question is, whether the defendant, under such circumstances, is liable to be charged in the manner now attempted. The declaration describes him as assignee of all the estate, right, title, &c. of the original lessee, *J. N.* This general form of pleading is allowed, because the plaintiff cannot be supposed to know the particulars of the defendant's title. It may be conceded to the defendant, that when the plaintiff is informed of the persons in whom the whole interest is vested, they must be sued jointly; but he insists that no one, even where the plaintiff is in ignorance of any other assignees, is liable to be sued singly. For this he relies upon *Hare v. Cator*. It there appeared, that Lord *B.*, tenant for life, with power to lease, demised certain premises in *Kent*, and others in *Surrey*, to the plaintiff at a pepper-corn rent, the plaintiff redemised them to Lord *B.* at an annual rent of 500*l.* The defendant afterwards purchased the premises in *Kent*, but

not those in *Surrey*, and did not take an assignment of the lease from the plaintiff to Lord *B*. The plaintiff brought covenant for the rent. The defendant there never was assignee of the interest in respect of which the plaintiff claimed the rent, for it was claimed in respect of the term which never was assigned, and the rent was issuing out of two distinct estates, one of which never came to him. That case, therefore, is not applicable to the present. There are many cases shewing that the assignee of a part is liable to be charged for that part. This case is somewhat different, for the defendant has no entire interest in any part, but a partial interest in the whole. The plea is not that defendant is liable to sustain a part only of a joint liability, but that he is not liable at all. That is a plea in bar, and I think clearly bad. It should have been that defendant was not liable to the whole burthen in the manner charged. He should have pointed out the other persons liable, and then the plaintiff might have been compelled to include them in his declaration.

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HOLROYD J. I am of opinion that the plea in question cannot be supported. Supposing it could be good as a bar to any part of the action, it should have been confined in its application to those parts of the premises of which the defendant meant to insist that he was not assignee. If it had been pleaded to all, save for one period, one sixth, and for another period one third, it would have raised a very different question from that which is now presented to us. There is another objection to this plea in form: even as to the parts of which the defendant admits himself to be in possession, he neither admits or denies the assignment. It seems to me, indeed, that either the first lessee or any person

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having part of his estate by assignment, if sued in such an action as this, may pray in aid other persons who are by assignment jointly possessed of other portions; but such a plea should be in abatement, and not in bar.

LITLEDALE J. I think that this plea is bad both in form and substance. It merely admits possession, and not an assignment. The latter part, in which it is alleged that the defendant had no greater part *by assignment* than as before mentioned, refers to the former part of the plea, and does not cure the informality. No issue could be taken upon it. It neither denies nor confesses and avoids. But it is bad in substance also. The ground of defence set forth in the plea is that the whole of the premises did not come to the defendant by assignment. If that were held good as a bar, the decision would amount to this, that if a lessee make assignments to various persons as tenants in common, the landlord can never sue until he discover them all. If the defendant meant to discharge himself of all liability beyond one sixth or one third, he should have confined his plea to so much of the action. There may be a difficulty in saying that the defendant should have pleaded in abatement, for he might not know the tenants in common with him. Either debt or covenant will lie for rent against the assignee of a part of an estate according to *Gamon v. Vernon* (a); and if debt or covenant will lie against the assignee of a part for rent, I see no reason why covenant should not lie for a portion of the damages sustained by the want of repairs. But however that may be, this plea is clearly bad, and the plaintiff must have judgment on the demurrer.

Judgment for the plaintiff.

(a) 2 *Lev.* 231.

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SHORLAND *against* GOVETT.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and remaining there a long time, to wit, for six hours, and until the plaintiff, in order to obtain the quiet and peaceable possession of his house, paid to the defendant 119*l.* 10*s.* 9*d.* of lawful money. As to breaking and entering the house, and making a noise therein, and remaining there for the space of time in the declaration mentioned, pleas, first, not guilty; second, actio non, because before the said time, when, to wit, on, &c. Sir *W. T.*, bart. sued out of the Court of our lord the king, before the king himself at *Westminster*, a certain writ of *fi. fa.* directed to the sheriff of *Somersetshire*, commanding him to cause to be levied of the goods and chattels in his bailiwick of *J. H.*, *R. S.*, and the plaintiff, as well a certain debt of 200*l.* which the said Sir *W. T.* had then lately recovered against them in his said majesty's said court; as also 10*l.* which in the same court were awarded to the said Sir *W. T.* for his damages, &c., which said writ was delivered to the said sheriff, who made his warrant to *R. S.*, and the defendant then and at the said time when, &c. being a bailiff of the said sheriff, and thereby by virtue of the said writ commanded them, &c. which said warrant afterwards and before the return of the said writ, and before the said time, when, &c. to wit, on, &c. was delivered to the defendant so being such bailiff, to be executed in due form of law, by virtue of which said writ and warrant the defendant afterwards, and before

Trespass for breaking and entering the plaintiff's dwelling-house, and remaining there until the plaintiff paid him a large sum of money, to wit, &c. Justification under a *fi. fa.* to the sheriff of *S.*, and a warrant thereupon to the defendant, as bailiff, directing him to levy —. Replication, that before the said writ and warrant were fully executed, the defendant demanded and received 3*l.* 10*s.* more than he was authorized to levy. On demurrer: Held, that the replication was bad, inasmuch as the facts alleged in it did not make out that the defendant was a trespasser ab initio.

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the return of the writ, to wit, at the said time when, &c. peaceably entered the said dwelling-house in order to levy the debt and damages aforesaid, according to the exigency of the writ, and on that occasion, and for that purpose stayed and continued in the said dwelling-house for the said space of time in the declaration mentioned, being a reasonable time in that behalf. And this, &c. Third plea to the trespasses in the introductory part of the second plea mentioned, stated the issuing of a fi. fa. indorsed to levy 110*l.* 15*s.* besides poundage, &c. and a warrant to defendant to levy; that defendant in obedience to the warrant, peaceably entered in order to levy, and did levy the said last mentioned sum, together with poundage, &c. Replication to the second plea, that the writ and warrant in that plea mentioned were respectively indorsed to levy a much less sum than the debt and damages in that plea mentioned, to wit, 110*l.* 15*s.*, besides poundage, &c. and that shortly after the defendant entered into the dwelling-house, in which, &c. and whilst he stayed and continued therein as in the second plea mentioned, and before the said writ and warrant were fully executed, the defendant, under colour and pretence of the said writ and warrant, extortionately and unlawfully demanded, exacted, and received of and from the plaintiff a much larger sum of money, to wit, 3*l.* 10*s.* more than he was entitled to levy upon the goods and chattels of the plaintiff, under and by virtue of the said writ and warrant, and according to the direction indorsed thereon as aforesaid; which said sum of 3*l.* 10*s.*, together with the further sum of 116*l.* 0*s.* 9*d.* amounting in the whole to a large sum, to wit, 119*l.* 10*s.* 9*d.*, being the amount then and there claimed by the defendant by virtue of the said writ and warrant,

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the said plaintiff was forced and obliged to pay for the purpose in the declaration mentioned. And this, &c. Similar replication to the third plea. Demurrer and joinder.

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E. Lawes in support of the demurrer. The replication was no doubt drawn upon the supposition, that the facts alleged in it proved the defendant to be a trespasser ab initio. But the *Six Carpenters'* case (*a*) is a direct authority the other way. It was there decided, that if the original entry be lawful, a subsequent nonfeazance will not suffice to make the party a trespasser ab initio. Such subsequent act must be itself a trespass. If, indeed, the plaintiff had tendered the money which the defendant was authorized to levy, and the latter had afterwards remained in the house, that might have made him a trespasser.

Manning contra. The rule given in the *Six Carpenters'* case is, "when entry, authority, or licence is given to any one by the law, and he abuse it, he shall be a trespasser ab initio." Now that is general, and applies to any abuse of the right given by the law, and does not make it essential that the abuse should amount to an act of trespass. The second resolution is, "that not doing cannot make the party a trespasser;" but if the argument on the other side be good, that resolution should have been, "that no act not amounting to a trespass should make him a trespasser." The real distinction is between misfeazance and nonfeazance, *Gates v. Bayley* (*b*). In *Winterbourne v. Morgan* (*c*), it was

(*a*) 8 Co. 145.(*b*) 2 Wils. 315.(*c*) 11 East, 395.

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held, that a person who entered to distrain, and remained after the expiration of the five days, became a trespasser; and the same was ruled in the case of *Griffin v. Scott* (a). *Aitkenhead v. Blades* (b) is a distinct authority, that an officer entering under an execution, and remaining longer than the law warrants, is a trespasser ab initio. Here the defendant should have left the premises when he got the sum directed to be levied; but, on the contrary, he did not go until he had extorted a larger sum. In 2 *Roll. Abr.* 562. tit. *Trespass ab initio*, many instances are put, where an officer, having the execution and return of process, is rendered a trespasser ab initio, either by neglecting to return a writ, or by making a false return; and the same was held in *Girling's* case (c).

BAYLEY J. It seems to me that this replication is bad, and that the defendant cannot be deemed a trespasser ab initio. In the cases cited from *Roll's Abr.* and *Cro. Car.*, where it is said that a sheriff is made a trespasser ab initio, by the neglect to return a writ, the expression is inaccurate. There, for want of the return, no complete justification was ever shewn. The distinction is this, where there are facts alleged on the record, making out a good defence, but something added in the replication destroys that defence, the party is made a trespasser ab initio. But if the sheriff seizes goods under a writ where it is his duty to make a return, he never has a justification unless he discharges that duty; he must, therefore, allege that return in his plea. A bailiff not having the return of process is not bound to

(a) 2 *Ld. Raym.* 1424.(b) 5 *Taunt.* 198.(c) *Cro. Car.* 446.

make

make such allegation, as appears by *Girling's* case, which has been cited for the plaintiff. Here, then, the defendant had a good justification without shewing a return. The answer given to it is, "that before the writ and warrant were fully executed, the defendant demanded, exacted, and received a larger sum than he was entitled to levy." Does that make him a trespasser with reference to the acts alleged in the count? Where the subsequent act is a trespass, the law assumes that the party did not enter for the purpose alleged in the plea, but for the purpose of committing the trespass. But here the subsequent act was not a trespass, nor can it be reasonably supposed that the original entry was for the purpose of the extortion. For these reasons, I think that the defendant cannot, in this case, be considered as a trespasser *ab initio*, and that our judgment must be in his favor.

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HOLROYD J. If the allegations contained in this replication were sufficient to make the defendant a trespasser *ab initio*, the consequences to him would be very serious, for he would be liable to damages to the extent of the whole sum levied, and not merely the surplus exacted illegally. He is still liable for the extortion, although not for the sum which he was authorized to levy. The cases cited as to the necessity of a return by a sheriff are not applicable. In them, but for the return, the act would have been unlawful *ab initio*; instead of saying that the want of the return made the sheriff a trespasser *ab initio*, it would be more correct to say that the presence of the return was necessary in order to make his act lawful *ab initio*. The only question here is, whether the first resolution in the *Six Carpenters'* case

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case was correct, viz. that the parties were not trespassers *ab initio*, because the subsequent act was not a trespass. This replication does not shew that the defendant held the goods longer than he was entitled so to do; but that he took 3*l.* 10*s.* more than he was authorized to levy. The whole money was paid at once, and until a part was paid, the bailiff had a right to keep possession. It is not averred that the smaller sum was tendered and refused; and perhaps even that, according to the doctrine in 8 *Co.* 146., might not have been sufficient.

LITLEDALE J. If the defendant were a trespasser *ab initio* there can be no doubt that the plaintiff would be entitled to recover the whole sum levied, just as if no justification at all had been pleaded. Considering the numerous instances of extortion that occur, there would unquestionably have been many actions of this nature had they been thought maintainable. It is contended, however, that such is the law according to the *Six Carpenters'* case. Whether there is much good sense in that case it is unnecessary to say; for the decision of the present question it suffices to say, that in every instance put by Lord *Coke* there was a subsequent act of trespass, which made the party liable to be treated as a trespasser *ab initio*. *Com. Dig. Trespass* (C. 2.), *Dye v. Leatherdale* (a), and *Taylor v. Cole* (b), all confirm Lord *Coke's* view of the case. Here no act of trespass subsequent to the entry and levy is shewn; the replication alleges the extortion to have been before the writ was fully executed. There are many statutes against ex-

(a) 3 *Wils.* 20.(b) 3 *T. R.* 292.

tortion,

tortion, but in none of them is it said that the party guilty of it is a trespasser; nor is he said to be so in any of the instances put in *Com. Dig. tit. Extortion*, or *Trespass ab initio*. I think, therefore, that this replication is bad.

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Judgment for the defendant.

ANNE STOKES, Administratrix of EDMUND
STOKES, deceased, *against* BATE.

THIS was an action on a promissory note given by the defendant to the intestate. The declaration contained one set of counts on promises to the intestate, and another upon promises to the plaintiff as administratrix. In the breach to the first set of counts it was alleged, that the defendant, intending to defraud the intestate in his lifetime, and the plaintiff as administratrix as aforesaid after the death of the intestate, (to which said plaintiff administration of all and singular the goods, chattels, and credits which were of the said *E. Stokes* deceased at the time of his death intestate, by *A. B.*, vicar-general and official principal of the Lord Bishop of *Chester*, in due form of law, was granted in that behalf), had not paid the said several sums of money

In assumption, by an administratrix upon a promissory note, given to her intestate, it was averred in the declaration, that administration of all and singular the goods and chattels of the intestate was duly granted by the bishop of *C.* Plea, that the plaintiff never had been, nor was administratrix of all and singular the goods and chattels of the intestate in manner and form as she had

alleged in her declaration; and issue being joined on this plea, the letters of administration granted by the bishop of *C.* were produced by the plaintiff; but it was also proved, that the intestate, at the time of his death, had bona notabilia in another diocese in a different province; and no evidence was given as to the residence of the defendant at the death of the intestate: Held, first, that the letters of administration were not void, inasmuch as the other diocese in which the intestate had bona notabilia was in a different province.

Held, secondly, that the only question raised upon the issue was, whether the letters of administration were duly granted by the bishop of *C.*, and that it was no part of the issue, whether the defendant, at the death of the intestate, resided within the diocese of *C.* The fact of his residence elsewhere, if relied upon, ought to have been specially pleaded.

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to the intestate in his lifetime, or to the plaintiff administratrix as aforesaid since the death of the intestate, although often requested so to do. The declaration concluded by a profert of the letters of administration. The defendant, after craving oyer of the letters of administration which were set out, pleaded, that the plaintiff was not, nor ever had been, administratrix of the goods and chattels, rights, or credits, which were of the said *E. Stokes* deceased, in manner and form aforesaid, as the plaintiff had in her said declaration in that behalf alleged. Replication taking issue upon this plea. At the trial before *Garrow B.* at the Summer assizes for the county of *Salop* 1825, the letters of administration in the common form from the Bishop of *Chester* were produced, but it was proved that the intestate at the time of his death had bona notabilia in the diocese of *Litchfield* and *Coventry* (which is in the province of *Canterbury*), as well as in that of *Chester* (which is in the province of *York*); and it was objected that the letters of administration were, therefore, void in toto, and that the plaintiff was not administratrix of the estate of the intestate. Secondly, that, at all events, she was not administratrix as to the debt which was the subject of this action, as the letters of administration only entitled her to sue for assets proved to have been in the diocese of *Chester*. The learned Judge reserved the points, and a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Campbell in last *Michaelmas* term moved accordingly. Where there are bona notabilia in two several dioceses, an administration granted by the bishop of either is
void,

void, *Burston v. Ridley* (a). The administration granted to the plaintiff by the Bishop of *Chester* was void, because there were bona notabilia in the diocese of *Litchfield* and *Coventry*, and no administration was granted by the bishop of that diocese. The plaintiff, therefore, was not administratrix of any of the goods of the intestate. But supposing those letters were not void, at all events she was not administratrix as to the debt which was the subject of this action, there being no proof that the debtor resided within the diocese of *Chester* at the death of the intestate. And upon the issue joined, it was incumbent upon the plaintiff to prove that fact.

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Per Curiam. Where an intestate has bona notabilia in two dioceses within the same province, neither diocesan has power to grant administration, but it must be done by the metropolitan of the province. But where there are bona notabilia within one diocese of one province, and another diocese in another province, the case is different. Now *Chester* and *Litchfield* are not in the same province, and therefore the administration granted by the Bishop of *Chester* was not void. It will operate as to any debt where the debtor at the time of the intestate's death lived in the diocese of *Chester*. The other question is, whether upon the issue it was incumbent upon the plaintiff to shew that she was administratrix as to this debt, by proving that the debtor at the time of the intestate's death resided in the diocese of the bishop by whom the letters of admi-

(a) 1 *Bulk.* 39.

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nistration were granted. It certainly would be more convenient (if the defendant relies upon the debtor's having resided elsewhere) that such matter should be specially pleaded. But whether it must be so pleaded may admit of some doubt; and, therefore, on that point the defendant may take a rule.

W.E. Taunton and *Russell* now shewed cause. Although specialty debts are bona notabilia at the place where the securities are at the death of the intestate, yet simple contract debts follow the person of the debtor, and administration must be granted in that place where the debtor resided at the death of the intestate, *Yeomans v. Bradshaw* (a). If, therefore, the debtor resided in the diocese of *Chester* at the death of the intestate, the debt was bonum notabile in *Chester*; and, therefore, as to this debt, the plaintiff was duly appointed administratrix. The plaintiff having produced the letters of administration, it lay upon the defendant to shew that this debt did not pass under them, by proving that the defendant did not reside in the diocese of *Chester* at the death of the intestate. But, secondly, if the defendant meant to rely upon this fact, in order to shew that the plaintiff was not entitled to sue in respect of this particular debt, he ought to have stated it in his plea. It being a general rule of pleading, that the plea must deny all or some essential part of the averments of fact in the declaration, or admitting them to be true, allege new facts which obviate or repel their legal effect. Here, the defendant in his plea has introduced no new matter, but has merely

(a) *Cart. 373.*

denied

denied the fact alleged in the declaration, that the plaintiff was administratrix. He has, therefore, only put in issue, whether the letters of administration were duly granted.

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Campbell and C. Phillips contra. There are two questions. First, what is the issue? Secondly, upon whom the onus of proving the issue lies? The issue involves two questions: first, did the bishop of *Chester* grant the letters of administration; secondly, did this debt pass by them to the administratrix. She says, in substance, she is administratrix of the debt she seeks to recover, and that the defendant denies in his plea. If this be the issue, it was incumbent on the plaintiff to prove not only the granting of the letters of administration, but that the defendant resided in that diocese, for otherwise the debt in question did not pass to the plaintiff. In *Com. Dig. tit. Administrator, B. 3.* it is laid down, that nothing passes to the administrator out of the diocese in which the administration is granted. The plaintiff avers, that she is administratrix of all and singular the goods and chattels of the intestate. The defendant says she is not administratrix in manner and form as the plaintiff hath alleged. If the plaintiff was bound to prove the allegation to the full extent, it is clear she has failed. But, assuming that she was not bound to prove that to the full extent, still at all events it was necessary to prove that she was administratrix of the deceased as to the debt in question. Her allegation, therefore, may be taken to be that she was administratrix quoad this debt. Now, that allegation involves in it two facts: first, that the letters of administration were granted by the

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the Bishop of *Chester*; and, secondly, that the debtor at the time of the death of the intestate lived within that diocese. Then, if that be so, it is quite clear that the plaintiff must, in order to support the affirmative of the issue she has taken upon herself, prove not only that the letters of administration were granted, but that the defendant resided within the diocese of the Bishop of *Chester* at the time of the death of the intestate. There is no authority to shew that this is a matter which must be specially pleaded. *Hilliard v. Cox* (a), *Mellor v. Barber* (b), and *Yeomans v. Bradshaw* (c), only shew that in those cases it was thought prudent to plead the facts specially, but not that it was necessary so to do. In Mr. Serjt. *Williams's* note to *The King v. Sutton* (d), it is laid down, that the defendant may give in evidence upon the plea of ne unques executor, that there were bona notabilia, for it confesses and avoids, and does not falsify the seal of the ordinary.

BAYLEY J. It appears to me, that on these pleadings, the question whether the defendant at the time of the death of the intestate was resident in the diocese of *Chester*, was not parcel of the issue. The plaintiff alleges in the declaration, that administration of all and singular the goods and chattels belonging to the intestate at the time of his death was granted to her by the bishop of *Chester*. The defendant by his plea craves oyer of the letters of administration, and then says that the plaintiff has never been administratrix of all and singular the

(a) 1 *Salk.* 57.(b) 3 *T. R.* 587.(c) *Carth.* 373.(d) 1 *Saund.* 274, 275.

goods

goods and chattels of the intestate in manner and form as the plaintiff hath in her declaration in that behalf alleged, and upon that issue is joined. It is not stated in the plea that the plaintiff is not administratrix as to the particular subject matter of this action, but only that she is not administratrix as she has described herself to be. The plea, therefore, merely puts in issue whether she is such administratrix as she has described herself to be. Upon principle and authority, I am of opinion that if the defendant intended to insist that by reason of any matter de hors the letters of administration, the plaintiff was not administratrix as to the particular debt, which was the subject of this action, he should have stated that matter in his plea. The precedents shew that this has been the usual practice. Thus, in *Yeomans v. Bradshaw (a)*, an action was brought against the drawer of a bill of exchange by an administratrix, under letters of administration granted by the bishop of *Durham*. The defendant pleaded that the city of *London* was without the diocese of *Durham*, and within the diocese of *London*, and that he, defendant, before and at the time of the death of the intestate, was and is an inhabitant and commorant without the diocese of *Durham*, to wit, at *London*, within the diocese of *London*. The plaintiff demurred, and the Court held this to be a simple contract debt, and the rule was that the bill should abate. In *Hilliard v. Cox (b)*, the action was upon promises by an administrator claiming under letters of administration granted by the archdeacon of *Berks*; the defendant pleaded, that at the time of the

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(a) *Carth.* 373.(b) 1 *Salk.* 37.

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death of the intestate, and the committing of administration, he was inhabiting and resident at *Oxford*. In both these cases the place of residence of the debtor at the time of the death of the intestate was stated upon the face of the plea. In *Griffith v. Griffith (a)*, debt was brought by an administratrix, and it appeared on the face of the declaration that letters of administration were granted by the bishop of *Bristol*; the defendant pleaded that the intestate died on the high seas, out of the jurisdiction of the bishop of *Bristol*, and that the letters of administration were therefore void, but on demurrer they were holden to be good, the right of granting them not being founded upon the dying of an intestate within a diocese, but upon his leaving goods therein; and there *Lee C. J.*, after noticing a mistake in the report of *Hilliard v. Cox*, 1 *Salk.* 37. says, "As there was a debt upon single contract due to the plaintiff's intestate at the time of his death, from a person who at that time resided within the diocese of *Bristol*, this, agreeably to what is laid down in *Yeomans v. Bradshaw (b)*, gave a right *prima facie* to the bishop of *Bristol* of granting letters of administration; and we will not intend that the plaintiff's intestate left bona notabilia in any other diocese. We will, on the contrary, rather intend, for the sake of supporting the letters of administration, that the plaintiff's intestate did not leave bona notabilia in any other diocese." These authorities prove, that wherever it was intended to shew that the letters of administration were void by some matters dehors them, or that they were not ap-

(a) *Sayer*, 83.(b) *Carth.* 374.

plicable to the particular subject matter in the suit, the uniform course of pleading has been for the defendant to state upon the face of his plea the specific circumstances which render them void, or which prevent the plaintiff from being entitled to sue. Upon these authorities, as well as upon the reason and principle of the thing, I am of opinion that upon this form of plea the only fact put in issue was, whether the letters of administration mentioned in the declaration were duly granted, and that the question whether the defendant resided in the diocese of *Chester* at the time of the death of the intestate constituted no part of the issue. The rule for entering a nonsuit must therefore be discharged.

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HOLROYD J. I am of the same opinion. The plaintiff does not allege by her declaration that administration of the particular debt was granted to her, but that administration of all and singular the goods and chattels of the deceased was granted to her. That allegation must be construed to apply to all the goods and chattels intended to pass by the letters of administration. That being so, the issue was, whether she was administratrix of the goods and chattels which passed by letters granted by the Bishop of *Chester*. The declaration need not shew that the archbishop or bishop had authority to grant the letters of administration. The law intends that he has such authority. It is true, indeed, that in *Denham v. Stephenson* (a) Lord Holt says, that in former times it was thought not enough even to shew an administration committed by a bishop, without averring

(a) *Salk.* 40.

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there were *nulla bona notabilia*. But in *Woodward v. Thompson* (a) and *Skidmore v. Winton* (b) it was held, that a declaration by an administrator need not allege that the archbishop or bishop by whom the administration was granted was *loci illius ordinarius*. If that be so, then the allegation in the plea that the letters were not granted in manner and form as the plaintiff has alleged, does not import that the bishop had not authority to grant the administration as to the debt which was the subject matter of the action. If the defendant intended to rely on any new matter as a defence, he should have stated it on the face of his plea. If this were not the case, this inconvenience would follow, that an administrator would upon this issue be called upon to prove the place of residence of his debtor, of which probably he might be wholly ignorant; whereas if the debtor (who knows the truth of this fact) must allege it, the administrator will have an opportunity of taking out new letters of administration.

LITTLEDALE J. It seems to me that the question whether the debtor lived out of the jurisdiction of the Bishop of *Chester* is not parcel of this issue. The plaintiff, by making profect of the letters of administration, verifies the allegation in the breach to the first set out of counts, that administration was granted to her by the Bishop of *Chester*. The letters of administration are in the common form and purport to give administration of all and singular the goods and chattels of the intestate. But though that be the language, it can only apply to those goods and chattels over which

(a) *Cro. Eliz.* 907.(b) *Cro. Eliz.* 879.

the grantor of the letters of administration had jurisdiction. The plaintiff, therefore, has in effect only alleged that administration has been granted to her of those goods and chattels of the deceased over which the Bishop of *Chester* had jurisdiction. The defendant by his plea denies that fact, and that only; and no more is put in issue than that which is alleged. It is no part of the issue joined in this case whether the defendant at the death of the intestate resided out of the diocese of *Chester*.

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Rule discharged.

J. HOLLIDAY, an Infant, by W. HOLLIDAY, his Father and next Friend, *against* ATKINSON and Others, Executors of M^cKNIGHT. (a)

ASSUMPSIT on a promissory note given by the testator to the plaintiff for 100*l.*, dated *July* 19, 1821, payable six months after date, and expressed to be for value received. At the trial before *Hullock* B., at the *Carlisle* Summer assizes 1825, it appeared that the plaintiff at the time when the note was made was only nine years old. The testator was then in an imbecile state, and died a few months after. It appeared that the testator was intimate with *W. Holliday*, but no evidence of consideration was given. The learned judge told the jury, that the note being for value received, imported that a good consideration existed, and that gratitude to the infant's father, or affection to the child, would suffice: Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient; and a new trial was granted. Semble, That an intention to evade the legacy duty would not have been a good consideration.

Where a promissory note, expressed to be for value received, was made in favour of an infant aged nine years, and in an action upon the note by the payee against the executors of the maker, no evidence of consideration being given, the learned judge told the

(a) This case was argued and decided during the term.

K k 3

Judge

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Judge told the jury, that the note being for value received, was *prima facie* evidence of some legal consideration. That it was not necessary to prove the consideration, but the defendant should have disproved it. That many good considerations might have existed, and that affection towards the plaintiff, or gratitude to his father, or an intention to avoid the legacy duty, would suffice. But that if they thought fraud had been practised, or the maker did not know what he was doing, they ought to find for the defendants. A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained in *Michaelmas* term, against which

Scarlett and *Patteson* shewed cause. The only question made at the trial was respecting the competency of the testator to make the note. There was no evidence to impeach the consideration; it was therefore unnecessary for the plaintiff to prove it, particularly as the note was expressed to be for value received, which raises a presumption that a good consideration was given. Then with respect to the observations of the learned Judge, *Woodbridge v. Spooner* (a) is a case where a note was given "for value received, and his kindness to me," and the consideration must have been held sufficient, for the plaintiff recovered without proof of any actual consideration given. In *Lee v. Mugeridge* (b), a moral consideration was held sufficient. In *Tate v. Hilbert* (c), Lord *Loughborough* would not decide that a note was invalid which was delivered as a gift. Here the motive might be to avoid the legacy duty.

(a) 3 B. & A. 253.

(b) 5 Taunt. 36.

(c) 2 Ves. jun. 111. 4 Br. Ch. Ca. 286.

Brougham and *Wightman* contra. There is no doubt that a consideration might have been presumed in this case, and had the learned Judge left it to the jury with that observation only, there would not have been any ground for this application. But he pointed out as good considerations, affection towards the child or gratitude to the father, and it is impossible to say that the verdict was not founded upon the supposition, that one or other of those considerations was the real one for giving the note.

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ABBOTT C. J. I think that this case must be sent to a new trial. I agree that where a note is expressed to be for value received, that raises a presumption of a legal consideration sufficient to sustain the promise; but that is a presumption only, and may be rebutted. Now, we find that this note was given to a boy only nine years old, whose father was living, and that the donor was in a state of imbecility, and not far from his death. It then became a question for the jury, whether the note was given upon any legal consideration, and I think that the direction given to them as to the sufficiency of gratitude to the father or affection to the son was improper. As at present advised, I should also think that the intention to avoid the legacy duty would not be sufficient, for then the note would not be payable until after the donor's death, and a promissory note is not good as a *donatio mortis causà*. But if a second verdict should be founded on the latter consideration, the question may be put upon the record.

Rule absolute. (a)

(a) The cause was not tried again, a compromise having taken place between the parties.

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HELSEY and Others *against* MEARS, TOMLINSON,
SALISBURY, and Others.

Where *A.*, the keeper of a coach-office, and a part owner in several coaches, made a contract with *B.* for the carriage of parcels which he was in the habit of sending from that office to various places: Held, that this bound the owners of all the coaches in which *A.* was a part owner, and as well those who became partners after the making of the contract, as those who were so before.

ASSUMPSIT against the defendants (who were common carriers) upon an undertaking to carry a box containing watch-cases, from *Chester* to *Liverpool*, and there deliver the same to the plaintiffs. Breach, that the defendants did not safely carry the same and deliver it; but, through the negligence of defendants and their servants, the box and its contents were wholly lost. Plea, the general issue. At the trial at the *Chester* Summer assizes, 1825, it appeared in evidence, that the plaintiff was a watch-case maker at *Liverpool*, and the defendants proprietors of the mail-coach travelling between that place and *Chester*. On the 15th of *September* 1824, the box in question was sent by the plaintiffs from *Liverpool* to one *Walker*, the assay master at *Chester*, with gold and silver watch-cases, of the value of 185*l.*, to be assayed. On the 16th the box, with the same cases, was sent by *Walker* to the mail-coach-office at *Chester*, which was kept by Mrs. *Tomlinson*, directed to the plaintiff's at *Liverpool*. The box was lost, and there was reason to suspect that it was stolen out of the coach-office at *Chester*. The defendants had put up a notice in the office, that they would not be accountable for any parcel or package whatever above the value of 5*l.*, unless the same were entered and paid for accordingly, at the time of delivery of such parcel to them or their agents. *Walker* did not enter and pay for the box in question as being of more than 5*l.* value; but in order

order to take the case out of the operation of the notice, *Walker* proved that he was in the habit of receiving boxes of the same description from various places, which were conveyed by coaches, of which the defendant, *Tomlinson*, was a proprietor. Three years before, a similar box, containing watch-cases that had been sent to him from *Coventry* to be assayed, had been lost. He then applied to Mrs. *Tomlinson*, one of the defendants, who was then a proprietor of the *Coventry* mail and also of the *Liverpool* mail, and she made the loss good. On that occasion she told him, that the proprietors were incurring a great risk in carrying such valuable parcels as his, that the carriage was not an equivalent for it; and they must decline carrying them in future. *Walker* said, if that was persisted in there must be an end of all their other arrangements with him. She then said, "Is our carrying them any accommodation to you?" to which he answered, "Certainly; whatever accommodates the trade accommodates me." She replied, "If that be the case, we will continue to carry them as usual." Nothing more than the charge for carriage of an ordinary parcel was then paid for the boxes with watch-cases. After that conversation, *Walker* continued to send such boxes as before, and settled the accounts for the carriage of all such boxes annually. He paid for the carriage to *Chester*, and charged it to the respective owners of the property. Some of the defendants had become partners in the *Liverpool* mail, after the time before mentioned, and *Salisbury* did not become a partner until after the last settlement of accounts between *Walker* and the coach proprietors at *Chester*. For the defendants it was contended, that as this conversation related to another coach, it was no evidence of a special contract to be responsible

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sponsible for valuable parcels sent by the *Liverpool* mail, unless insured, and that it could not be evidence against any persons not then partners in the concern, and certainly not against *Salisbury*, who did not become a partner until after the last annual settlement of accounts. Secondly, that the loss proved was by a felony, and not by the negligence of the defendants. The learned Judge left it to the jury to say, whether there was a special contract to carry goods of this description sent by *Walker* at the ordinary rate of carriage, without insurance, and they found that there was. The jury were then asked, whether the loss was by a felony or by negligence, in order to give the defendants' counsel an opportunity of taking the opinion of this Court, as to whether the defendants were liable if the loss were by felony. The jury found that the loss was by felony, and not by negligence. A verdict was thereupon entered for the plaintiffs, the defendants having leave to move to enter a nonsuit. In *Michaelmas* term a rule nisi for that purpose was obtained, and now

Temple and *Parke* shewed cause. There was evidence of a special contract fit for the consideration of the jury, and they were warranted in finding for the plaintiffs upon that point. Mrs. *Tomlinson*, a partner in several coaches, agreed to carry the boxes sent by *Walker*, the assay master, at the ordinary rate of carriage, notwithstanding the notice. That contract bound the partners in each coach by which they were sent, of which Mrs. *Tomlinson* was a proprietor. *Walker* could not tell who were the other partners. Then the annual settlement of accounts upon the footing of that contract proves the recognition of it by the new partners, who

came into the concern before the last settlement. *Salisbury* also was bound; for a person coming into a firm must be bound by all the equities attaching upon it at that time. If, then, the notice does not affect the question, the plaintiffs are clearly entitled to recover; for the defendants, by suffering the box to be stolen, were guilty of negligence in law.

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Cross Serjt. and *J. Williams*, contra, contended, as at the trial, that the conversation with *Mrs. Tomlinson* was not evidence to affect those who afterwards entered into the concern. It did not even relate to the *Chester* and *Liverpool* mail, nor was there any evidence that the notice was put up before that time. If it was not, then the plaintiffs, or their agent, *Walker*, who was aware of the notice, must be taken to have dealt upon the terms pointed out by that notice. Secondly, the jury having found that the box was stolen, and that the servants of the defendants were not guilty of negligence, all those cases where negligence was relied upon to destroy the effect of the notice are inapplicable.

BAYLEY J. I am of opinion that this rule for a new trial must be discharged. There is no doubt that common carriers may limit their responsibility by a notice, that they will not be answerable for goods of more than a certain value; but they may, notwithstanding a general notice of that description, be bound by a special contract made with any individual. Now it seems to me, that from the conversation between *Mrs. Tomlinson* and *Walker*, if that were believed, the jury might very well infer that she undertook to carry all parcels sent by *Walker*, as assay master, by any coaches of which she was

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was a proprietor, at the ordinary rate of carriage. If it proved a contract, I have no difficulty in saying it would bind all the partners at that time, and all who might afterwards become so, until some notice of an intention to rescind the contract was given to *Walker*. It does not distinctly appear when the notice was put up; if it was put up before this conversation with Mrs. *Tomlinson*, that would take it out of the notice; if it was introduced at a subsequent period, it was the duty of Mrs. *Tomlinson*, if she meant to vary the course of dealing with *Walker*, to give him special notice of such intention. For these reasons, it appears to me that the verdict found for the plaintiffs ought not to be disturbed.

HOLROYD and LITLEDALÉ Js. concurred.

Rule discharged.

The KING *against* NORTH PETHERTON.

A register of baptism per se is no evidence of the place of birth of the party baptized.

UPON appeal against an order of two justices, whereby a pauper, described as *Joseph Rich*, otherwise *Coles*, the son of *Elizabeth Derham*, formerly *Rich*, widow, was removed from the parish of *North Petherton*, in the county of *Somerset*, to the parish of *West Monckton* in the same county, the court of quarter sessions set aside the order of removal, subject to the opinion of this Court on the following case:

The pauper, who was proved to be the legitimate son of *John* and *Elizabeth Rich*, was born in the parish of *West Monckton*. In order to make out the settlement of the pauper's father, it was proved by the production of a
 copy

copy of the parish register of *Spaxton*, that he was baptized in that parish. There was no other evidence of his having been born in that parish, and the court of quarter sessions thought, upon the authority of the case of *Creech St. Michael v. Pitminster*, *Burr. S. C.* 765., that they were bound to consider the register by itself *prima facie* proof of the place of his birth.

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C. F. Williams and *T. Cabbell*, in support of the order of sessions. The register of the baptism of the pauper's father was sufficient *prima facie* evidence of his having been born in the parish where he was baptized. *Creech St. Michael v. Pitminster* (a) is in point. There the register of baptism was produced. There was evidence besides that the father and mother lived in *Pitminster*, but there was no evidence to shew that they lived there, either before or at the time of, or shortly after the birth of the pauper, or that the pauper was born in *Pitminster*. The presumption *prima facie* is, that a party was born in that place where he was baptized. For by the ecclesiastical law, as far back as the reign of King *Edward* the Sixth, and again in the reign of King *Charles* the Second, "the pastors and curates are directed to admonish the people, that they defer not the baptism of infants any longer than the *Sunday* next after the child be born, unless upon great and reasonable cause declared to the curate, and by him approved." *Gibson's Codex, Jur. Ecclesiastici Baptism.* tit. 18. c. 9. But the register of baptism is certainly evidence of the pauper's father being in the parish of *Spaxton*, and it is the only parish in which he is stated to have been; and is

(a) 3 *Burr. S. C.* 765.

therefore

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therefore his place of settlement, until the contrary be proved on the authority of the case of the parish of *Banbury* and the parish of *Broughton* (a), in which *Holt* C. J. is reported to have said, “where the child is first known to be, that parish must provide for it till they find another.”

Erskine (and *G. Barnard* was with him) contra, was stopped by the Court.

BAYLEY J. The register of baptism per se is not evidence of the place of birth. If the age of the child at the time when it was baptized could be ascertained, the register might, in some cases, be evidence of the place of birth. If the child were then very young, the register would be presumptive evidence that it was born in that parish where it was baptized; but if the child were not then young, the circumstance of its having been baptized in a particular parish, would afford no presumption that it was born there. Here there was no evidence to shew the age of the child when it was baptized. We think, therefore, that the case must go back to the sessions to be reheard, in order that they may ascertain by other evidence whether the father of the pauper was born in the parish of *Spaxton* or not. We do not say that a register of baptism is not evidence of the place of birth, when accompanied with proof of other circumstances, but that taken by itself it is not evidence of the place of birth.

Case sent back to the sessions.

(a) *Comb.* 364.

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The KING *against* The Inhabitants of WHEEL-
LOCK, in the County of CHESTER.

COTTINGHAM moved for a rule nisi for a writ of mandamus to the justices of the peace of the county of *Chester*, directing them to make a special entry on their proceedings at the last *Easter* sessions, that the order of removal of the pauper from the above parish was quashed for want of proof of the chargeability of the person removed.

Where an order of removal is appealed against, and is quashed generally by the sessions, the appellant on the trial of another appeal may shew by evidence the distinct ground upon which the former order was quashed.

The affidavit on which this application was made stated, amongst other matters, that on the trial of the appeal, the court below being of opinion that there was not sufficient proof of chargeability of the person removed, refused to enter into the merits, but quashed the order generally; and, although much pressed, would not permit the clerk of the peace to make a special entry on their proceedings of the particular and only ground upon which it was quashed.

BAYLEY J. The respondents are not, at all events, concluded by the judgment of the sessions, but may on the trial of another appeal against another order of removal of the same party, explain by evidence to the sessions the particular ground on which the former order of removal was quashed.

HOLROYD J. concurred.

Rule refused. (a)

(a) See *Rex v. Inhabitants of Knoploft*, 2 B. & C. 886.

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ALLEN *against* BRYAN.

The assignee of a rent may maintain debt for arrears of the rent.

DEBT for rent. The declaration stated, that by an indenture bearing date *February 24th, 1814*, between *William Fell* and the defendant, the former demised to the defendant certain premises for fourteen years, at the yearly rent of 100*l.* Covenant by the defendant to pay the rent. And afterwards, by another indenture between *Fell* and the plaintiff, the former assigned to the plaintiff the rent reserved by the said lease, the counterpart of the lease, and the benefit of the covenants for payment of the said rent therein contained, for the remainder of the term. That afterwards, to wit, on, &c., 50*l.* for a half year's rent became due, and was still unpaid, &c. Demurrer and joinder.

Comyn, in support of the demurrer, stated, that the point intended to be raised for the defendant was, that the assignee of the rent could not bring debt for it, inasmuch as there was no privity between him and the tenant, but admitted, that *Robins v. Cox* (a) was an authority against him, and had never been overruled; and upon the authority of that case the Court gave judgment for the plaintiff.

Judgment for the plaintiff (b).

Parke was to have argued for the plaintiff.

(a) 1 *Lev.* 22.

(b) See *Knowles's* case, *Dyer*, 56. *Ards v. Watkin*, *Cro. Eliz.* 637. *Marle v. Flake*, 3 *Salk.* 118. In those cases the judgment proceeded upon the ground that the tenant having attorned the privity of contract was transferred, but attornment is now rendered unnecessary by the 4 *Ann.* c. 16. s. 9.

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LOGAN *against* BURTON.

TRESPASS, for breaking and entering the plaintiff's close, in the parish of *Egham*, in the county of *Surrey*, called the *Farm Yard*, and abutting towards the west on a certain public highway there called *Prune Hill Road*, and towards the east on certain other closes there also situate, belonging to the plaintiff. The second count stated that the defendant, on, &c., at, &c., broke and entered a certain other close of the plaintiff called the *Allotment*. Plea, first, a public footway over the closes at the time of the trespasses. Secondly, that at the time of the trespasses, &c. the defendant was seised in fee of a messuage and closes called *Bakeham House Farm*, near the said closes, in which, &c., and that defendant, and all those whose estate he had in the said messuage and closes immemorially had a footway for himself and themselves and servants, farmers and tenants, occupiers of the said messuage and closes from *Prune Hill Road*, towards and into, through, over, and along the said

An inclosure act authorised the commissioners to stop up old roads in the parish, besides those over the lands to be enclosed, provided it were not done without the concurrence of two justices. Semble, that under this clause the concurrence of two justices was necessary to warrant the stopping up of any part of a public footway which passed through an old inclosure.

By the 41 G. 3. c. 109. s. 8. the commissioners are authorised to set out and appoint the public carriage

roads and highways through and over the lands and grounds to be inclosed, and to divert, turn, and stop up any of the roads and tracks upon and over all or any part of the said lands and grounds: provided, that in case the commissioners shall be empowered by any local act to stop up any old or accustomed road passing or leading through any part of the old inclosures in such parish, the same shall in no case be done without the concurrence and order of two justices: Held, that, under this section, the commissioners were authorised to stop up or divert footways as well as carriage roads; and that the proviso at the end of the section was not confined to carriage roads, but extended to every species of ways, and, therefore, where the commissioners were empowered by the local inclosure act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held, that in order effectually to stop up a public footway passing partly over the lands to be inclosed and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices, and no such order or concurrence having been obtained, it was held that a footway which the commissioners ordered to be stopped up had not been effectually stopped, but continued a public footway.

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closes in which, &c. unto and into *Rusham Green Road*, towards and into the parish church of *Egham*, and from thence back again unto, into, through, over, and along the said *closes*, in which, &c., unto and into the said *Prune Hill Road*. The defendant, in another plea, claimed the way by a grant. The plaintiff having in his replication traversed the rights of way claimed by the defendant in his pleas, issue was joined thereon. At the trial before *Alexander C. B.*, at the Spring assizes for the county of *Surrey*, 1824, it appeared, that the way claimed by the defendant extended from the *Prune Hill Road*, eastwardly, through *Rusham Farm Yard*, (the close in the first count mentioned, which was an old inclosure,) thence in the same direction over certain lands of the plaintiff, which had been allotted in 1814, under an inclosure act for inclosing lands in the parish of *Egham*, in the county of *Surrey*, to one *Mary Bartholomew*, the former proprietor of *Rusham Farm*, and thence over certain other lands called *Egham Field*, along a road called *Egham Field Road* which led into *Rusham Green Road*. The commissioners in their award did not notice the road over the farm yard, but set out a footway, beginning at the gate on the east side of the farm yard of *Mary Bartholomew*, and extending eastwardly over the allotments awarded to *Mary Bartholomew* and others respectively into the *Egham Field Road*, which said footway was set out for the use only of the proprietors or occupiers of *Bakeham House Farm*, belonging to *Thomas Burton*. On the production of the award, the Lord Chief Baron was of opinion, that the public footway (if any such ever existed) over the new inclosure, was extinguished by the award, and, consequently,

sequently, that there was no such *public way* as that claimed by the defendant in his pleas, viz. a way over the plaintiff's closes into *Rusham Green Road*; and, secondly, assuming that the defendant or the owners of his estate, before the inclosure and award, had a right of way by prescription, that the title by prescription was extinguished by the inclosure act and award, and that he ought to have claimed his way under the award. A rule nisi for a new trial was obtained in *Easter term* 1824, and cause was shewn against the rule at the sittings in banc. after *Trinity term*, 1824, and the Court were of opinion, that it ought to have been left to the jury to find, whether, before the making of the award of the commissioners, the defendant had any private right of way by prescription or not: for if he had, then the award would not destroy, but confirm the old title. The rule for a new trial was made absolute, and upon the application of the defendant, it was made part of the rule, that he should be at liberty to amend his pleas; and that in case he should amend, and a new trial be had, the costs of the former trial were to be borne by the defendant, if he should not establish a right of way upon the pleadings as they stood at the time of the first trial. The defendant pleaded the following additional pleas: that before the time when, &c., and before the passing of the inclosure act, and the making of the award, there was a common and public highway from *Prune Hill Road* towards, into, through, over, and along the said *closes*, in which, &c., towards and into a certain other highway, for the king's subjects to pass on foot; that on, &c., at, &c., an act of parliament was passed, for inclosing lands in the parish of *Egham*, in

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the county of *Surrey*; that the commissioners for carrying the act into execution duly made their award, and, among other things, awarded that a footway beginning at the gate entering the farm yard of *Mary Bartholomew*, and extending eastwardly over the allotment awarded to the said *Mary Bartholomew*, into the *Egham Field Road*, should be set out for the use of the proprietors of *Bakeham House Farm*, belonging to *Thomas Burton*, Esquire. Averment, that the footway so set out by the award was a footway into, through, and over the said closes in which, &c., in the same line and direction with the public footway thereinbefore mentioned; and that defendant, before and at the said times when, &c., was and is seised in his demesne as of fee, of and in, and was and is the proprietor and occupier of the said *Bakeham House Farm*; and having occasion to use the footway to pass, &c. over the said closes, committed the supposed trespasses. Replication, that the supposed footway so alleged to have been set out was not nor is a footway into, through, over, and along the said closes in which, &c. in the same line and direction with the public footway, in manner and form, &c. Upon that issue was joined. Another plea stated, that before and at the time of the trespasses, and before the passing of the inclosure act, and the making of the award of the commissioners, defendant was seised in his demesne as of fee, of and in, and was the proprietor of *Bakeham House Farm*, and then prescribed for a private footway for the defendant and his servants, farmers and tenants, occupiers of the said farm over both closes, before the making of the award. It then stated the passing of the inclosure act, the making of the award, and that the
footway

footway set out by the award was a footway over the closes in which, &c. in the same line and direction as in the last plea. Upon this plea the same issue was taken and joined. There then followed two similar pleas to the first count of the declaration, as to the way over the farm yard, upon which the same issues were also taken and joined. There were also two similar pleas pleaded to the second count, as to the way over the allotment, upon which the same issues were taken and joined. The cause was tried again at the Spring assizes for the county of *Surrey*, 1825; and the jury found, that before the passing of the inclosure act, and the making of the award of the commissioners, there was a public way over the closes in which, &c., but that there was not any private way by prescription.

A verdict was entered for the plaintiff, with liberty to the defendant to move to enter a verdict for him on all or any of the issues. *Marryat* in *Easter* term obtained a rule nisi to enter a verdict for the defendant on the issues joined on all the special pleas except those which traversed the rights of way by grant and prescription as annexed to the defendant's estate, and he contended that the public way which existed before the inclosure act, and which passed partly through an old inclosure and partly through the lands inclosed, had not been duly stopped up by the commissioners under the inclosure act, inasmuch as it did not appear to have been done with the concurrence and by the order of two justices. The local act 54 G. 3. c. 153. s. 1. authorized the commissioners to stop up old roads in the parish besides those over the lands to be inclosed, "provided it were not done without the concurrence of two justices." The

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road through the *Farm Yard* was an old road, passing over other lands than those to be inclosed. But ever assuming that this was not a case within that clause of the local act, at all events it was a case within the proviso in the eighth section of the general inclosure act 41 G. 3. c. 109., which enacted, that in case the commissioners should be by the local act empowered to stop up any old or accustomed road passing or leading through any of the old inclosures in the parish, the same should not be done without the concurrence or order of two justices. Here the footway claimed by the defendant, was an old or accustomed road passing through a part of the old inclosures in the parish. Secondly, he contended, that at all events the defendant was entitled to have the verdict entered for him on some of the issues on the new pleas, in which it was alleged, that the way set out by the commissioners was a way in the same line and direction as the way which was used before the inclosure act.

The case came on for argument at the sittings in banc. after *Trinity* term, 1825, and the Court then decided that the defendant was entitled to have the verdict entered for him upon the issues joined upon the pleas, which alleged that the commissioners by their award had set out over the *allotment* a footway in the same line and direction as the ancient way. *Marryat* then insisted that the defendant was entitled to the costs of the first trial under the rule of Court, for that the defendant ought to have the verdict entered for him upon the issue raised upon the second plea, which alleged, *that at the time of the trespasses there was a public highway over both closes*. That point was argued at the sittings
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in banc. after *Hilary* term, 1826, by *Barnewall* for the plaintiff, and *Marryat* and *Chitty* for the defendant. The argument on the part of the plaintiff was in substance as follows: the clause of the local act, which requires the concurrence of two justices in case the commissioners stop up old roads in the parish *besides those over the lands to be inclosed*, applies only to cases where the road to be stopped up passes *wholly* over other lands exclusively of those to be inclosed, and not to this case, where it passes partly over the land to be inclosed and partly over other land which was not to be inclosed. The proviso in the eighth section of the general inclosure act does not apply to footways, but to carriage roads and highways, which the legislature deemed to be of greater importance to the public, and therefore required, that before such roads were stopped up or diverted the commissioners should have the concurrence of two justices. By that section the commissioners are authorized "to set out and appoint the public *carriage roads and highways* through and over the lands to be inclosed, and to divert, turn, and stop up any of the *roads and tracks* upon such lands, so as such *roads* and highways shall remain thirty feet wide at the least." The term *footway* is not mentioned in this section, and there is no other section which authorizes the stopping up of any *public* footway. It must, therefore, be included under the word *track*, for it could not be intended to be included in the word *roads*, for they are directed to be thirty feet wide. The term *road*, *ex vi termini*, applies rather to a way used for the purpose of riding than of walking, and it seems in this section to be generally

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used to denote carriage roads. Section 10. authorizes the commissioners to set out private ways, and there bridle ways and *footways* are expressly mentioned. If the term *road* in this section was not intended to comprehend a footway, the proviso at the end of it must be taken to apply to carriage roads only, and not to foot-paths, and if that be so, then the commissioners had the power to stop up the footway over the old inclosure without the concurrence of two justices, and not having set it out as a public way, the right which the public once had was extinguished by the award, *Rex v. The Commissioners of Dean Inclosure*. (a) It has not in practice been considered necessary where a footway passes partly over the lands to be inclosed and partly over lands already inclosed, to obtain an order of justices to stop it up. The way not being set out in the award of the commissioners has been considered to operate as an extinguishment of it. If this should be held now to be an ineffectual mode, it will necessarily have the effect of re-opening many roads over inclosures which have in practice been disused for a long time.

The argument on the part of the defendant was in substance as follows: the 21st section of the local act ought not to be confined in construction to roads which pass *wholly* over other lands in the parish exclusively of those about to be inclosed, but it comprehends roads passing partly over the lands to be inclosed, and partly over other lands in the parish. Secondly, the footway is included in the term *road* in the proviso in the 41 G. 3. c. 109. s. 8. The object of the legislature

(a) 2 M. & S. 80.

was, that in any case where the public were interested in any road passing through an old inclosure, they should have the same security against its being improperly stopped as they have in an ordinary case, viz. that it should not be done without the concurrence of two justices. Now, as the public may be as much interested in the continuance of a footway as in that of a carriage way, this is a case which the legislature clearly had in view; but the Court of Exchequer decided in the case of *Harber v. Rand (a)*, that under the 8th section of the general inclosure act, the positive concurrence and order of two magistrates are absolutely necessary for the stopping up of roads, whether they be public roads or private or bridle or footways. That case is expressly in point, and must govern the present.

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Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court.

This was an action of trespass for entering one close called the *Farm Yard*, and another close called the *Allotment*. The defendant justified under a private right of way by prescription or grant, which was negatived, and under a public right of way, which was found for him; but the public right was stated in two ways: first, as continuing down to the time of the trespass; and, secondly, as continuing down to the time of an inclosure act of the 54 G. 3., and from that time as being converted from a public into a private right; and as certain costs will depend upon which of these is the subsisting right, it is necessary to

(a) 9 Price, 58.

decide

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decide this question. The closes are in the parish of *Egham*, and one of them was inclosed under the 54 G. 3. c. 158., entitled an act for inclosing lands in *Egham*; and the other is a *Farm Yard*, and was an old inclosure long before that act. Before the passing of that act there was a public footpath from *Egham* over the uninclosed lands unto and through the *Farm Yard*. The *Farm Yard* opened on the opposite side upon a common road. The commissioners under the inclosure act set out what had previously been this public footpath over the land to be inclosed as a private way for the occupiers of the defendant's farm, and whether this put an end to the public footpath over the *Allotment* and also over the *Farm Yard* is the point in question. It was contended for the defendant that the public way continued over both, the concurrence of two magistrates being, as the defendant's counsel insisted, essential to prevent its continuing a public road; and there having been no such concurrence. The plaintiff insisted that the public way was at an end as to both, or at least that it was so as to the *Allotment*; and if it was at an end as to either, it was sufficient for his purpose. The point depends upon the construction of sections 8. 10. and 11. in the 41 G. 3. sess. 2. c. 109. and 54 G. 3. c. 153. s. 21. The 8th section of the 41 G. 3. directs the commissioners to set out and appoint the public carriage roads and highways over the lands to be inclosed, and to divert and stop up any of the roads and tracks over such lands, with a proviso that they shall stop up no old or accustomed road leading through any part of the old inclosures in such parish, township, or place, without the concurrence of two justices. The 10th section requires

quires them to set out such private roads, bridle ways, and footways, in, over, or by the sides of the allotments as they shall think requisite; and section 11. provides that after such public and private roads and ways shall have been set out, all roads, ways, and paths over such lands (*i. e.* the new inclosed lands) which shall not be set out as aforesaid shall be for ever stopped up and extinguished. I shall afterwards refer more particularly to the language of that act, because the decision of the Court depends on the construction to be put upon it. By 54 G. 3. c. 153. s. 21. the commissioners may stop up old roads in the parish, besides those over the lands to be inclosed, provided it be not done without the concurrence of two justices. It is, therefore, either under this latter clause in the 54 G. 3. or under the 8th section of the 41 G. 3. c. 109. that the concurrence of two magistrates can be required. The clause in the 54 G. 3. is either confined to such roads as pass *wholly* over other lands in the parish, exclusive of those to be inclosed, and not passing in any part over the lands to be inclosed, and then it is inapplicable to this case, or it also extends to such roads as pass as well over the lands to be inclosed as over other lands in the parish, and then it applies here; and I incline to think it extends to both. There might have been some old roads in the parish wholly unconnected with the lands to be inclosed, but there might be others leading over the lands to be inclosed, and also over other lands in the parish, and the latter parts of such roads might be called roads *not passing over the lands to be inclosed*; and though the language be not very accurate, "roads *besides* the roads which passed over the lands to be inclosed;" there might

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might be public footways leading from one village to another, passing through old inclosures in the parish of *Egham* to the lands to be inclosed, and leading from those lands passing through other inclosures in the parish of *Egham*; and if such public footways are not within the power and the protection of this clause, the commissioners will be able without the concurrence of two justices to stop up such a road and deprive the public of the use of it, if the 41 G. 3. c. 109. gives them such power; and if the 41 G. 3. c. 109. does not give the power, they will not be able to interfere with it at all; and it can hardly be supposed that either of these results was intended. If the construction be doubtful, that construction should be adopted which, whilst it gives the greatest power to the commissioners, most effectually guards the rights of the public. We are therefore disposed to think, that under the 54 G. 3., the concurrence of two justices was necessary to warrant the stopping up that part of this road which was beyond the limits of the land to be inclosed, i. e. the part over the *Farm Yard*.

But under the 41 G. 3. c. 109. we think in this case the concurrence of two magistrates necessary, as well for that part of the road which was over the land to be inclosed, as that which led through the farm yard. This depends mainly upon section 8. That section, in some parts of it, seems to have in view exclusively carriage roads; but in others, particularly in that part which relates to the diverting and stopping up of roads and tracks, it appears to apply to every description of road, whether a bridle or foot road only, or a carriage way also, and we think the proviso at the conclusion of that

that clause is not confined to carriage ways, but extends to every species of road. The eighth section provides "that the commissioners, before they proceed to make any of the divisions or allotments directed by any such act, (viz. the local act,) shall set out and appoint the public carriage roads and highways, through and over the lands and grounds intended to be divided, allotted, and inclosed." So far the words are applicable to carriage roads. Then it goes on to direct, that "they are to divert, turn, and stop up any of the roads or tracks, upon or over any part of the lands and grounds as they shall judge necessary." There the language is altered from roads and highways, to *roads and tracks*. Then there comes a provision, which I think applicable to "carriage roads and highways," as contradistinguished from the "roads and tracks." That provision is, "so as such roads and highways shall be and remain thirty feet wide at the least." It is impossible to say that that provision is applicable to those roads and tracks which may be diverted, turned, and stopped up. I consider the section as if the words, "divert, turn, and stop up, &c." were written in a parenthesis; and it should be read, "that the commissioners shall have power to set out and appoint public carriage roads and highways, so as those roads shall be and remain thirty feet wide at the least, and so as they shall be set out in such mode and direction, as in the whole should be most convenient to the public." The words there, "*so as they shall be set out,*" shew that the words roads and highways, which are to remain thirty feet wide at the least, are applicable to roads which are to be set out, and not applicable to those

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those roads and tracks which are to be diverted, turned, or stopped up. The question in this case turns materially on the meaning to be attached to the words "roads and tracks" in that part of the section which authorises the commissioners to divert, turn, or stop up. If this provision is applicable to carriage roads only, it would be singular that the legislature should have introduced the phrase *roads and tracks*, and not have continued the phrase *roads and highways*, which had been before used. And adverting to the other clauses of the act, it appears that there is no provision applicable to roads and tracks not being carriage roads or carriage tracks, unless the words *roads and tracks* be applicable to every description of roads. There is no express provision with respect to public bridle ways or public foot ways, but they must be subject to the general provision in the eleventh section, and if the justices have no power to set them out, and they are not protected by this proviso, they must of necessity be stopped up. The eighth section then provides, that there shall be a map in which the intended roads shall be accurately laid down and described; and it speaks of carriage roads, as being those to which the attention of the legislature appears to have been particularly directed. Then comes the proviso, "that in case such commissioner or commissioners shall by such bill be empowered to stop up any old or accustomed road passing or leading through any part of the old inclosures in such parish, township, or place, the same shall in no case be done without the concurrence and order of two justices of the peace." It does not say "any old or accustomed *carriage road*," but uses the word *road* generally. Now, if the former part of the

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the section, or any part of it, particularly that which relates to stopping up ways, applies not only to carriage ways, but to bridle ways and footways also, then the proviso must have the same application ; and, therefore, when the commissioners are empowered to stop up an old carriage road, an old bridle way, or an old foot way, passing or leading through any part of the old inclosures, they must have the concurrence and order of two justices of the peace for that purpose. The tenth section of the act seems to apply to private bridle ways and private footways. The eleventh section provides, that all roads, ways, and paths which are not set out shall be for ever stopped up and extinguished, but that applies only to such roads as pass over the lands and grounds to be inclosed. Those ways which passed partly over lands to be inclosed, and also over other inclosures, are within the protection of the eighth section. One question therefore is, are the commissioners empowered by the 54 G. 3. to stop up *any* old or accustomed road passing through any part of the old inclosures in the parish? I have already expressed our opinion, that they may stop up such as are unconnected with and pass over no part of the land to be inclosed, and that they may stop up such as are connected with it, and form a part of it; and if it were doubtful whether this act in the latter case gave an *express* power, we think from the manner in which the road over the land to be inclosed is connected with the road through the *Farm Yard*, that it gave the commissioners an implied power to stop it up, which is equivalent. But that power cannot be exercised without the concurrence of two magistrates, which in this case was not obtained.

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The consequence is, that the defendant is entitled to enter his verdict on the pleas, which justify under a public right of way.

Rule absolute.

DICKINS *against* JARVIS and SMITH.

Where a cause and all matters in difference were referred by order of nisi prius, and the arbitrator by his award found "that nothing is due to the plaintiff:" Held, that this must be considered as a finding, that the plaintiff had no right to recover in the action.

The arbitrator had power to enlarge the time for making his award, by indorsement on the order of reference; that order, together with two indorsements, enlarging the time, was made a rule of court: Held, that on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.

By the order of reference, costs were to abide the event; there were two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The master taxed the whole costs of the cause, and the reference in one sum to the other defendant, by whom payment was demanded of the plaintiff. The Court refused to grant an attachment for nonpayment of those costs. Query, Whether the master had power to tax costs for the two defendants separately.

ASSUMPSIT. Plea, the general issue by each of the defendants separately. By an order of nisi prius the cause and all matters in difference were referred to an arbitrator, and it was stipulated that the costs of the cause should abide the event; and that the arbitrator might from time to time enlarge the time for making his award by indorsements on the order of reference. The arbitrator after enlarging the time twice, made his award, "that there is nothing due to the plaintiff." *Jarvis* did not appear by counsel when the cause was called on for trial, nor did he attend or take any part in the proceedings before the arbitrator. Upon this award the master taxed the costs of the cause and of the reference to *Smith*, who demanded them as the costs of the said cause and reference, according to the master's allocatur, which was for 56*l.* and made no distinction between the costs of the trial and those of the reference. Upon the plaintiff's refusing to pay them, the order of nisi prius, together with the indorsements enlarging the time for

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making the award, was made a rule of court, and a rule nisi, for an attachment for non-payment of the costs, was obtained upon an affidavit stating that the plaintiff had been served with copies of the award, the master's allocatur, and the rule of court, but it did not state that any affidavit of the due enlargement of the time was shewn to him, nor was any such affidavit produced on moving for the rule.

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Cresswell shewed cause, and contended, first, that the affidavit on which the rule was obtained, should have shewn that the time for making the award was duly enlarged, *Halden v. Glasscock*. (a) Secondly, that the award had not determined the action in favor of the defendants, the finding being, "that nothing is due," not that nothing was due at the time when the action was commenced. Thirdly, that *Smith* alone could have no right to demand the costs. That *Jarvis* had pleaded to the action, and that the award being general, in favor of the defendants, the judgment would be joint; that the master had not affected to tax separate costs to the two defendants, but had taxed the whole to *Smith*, and that according to *Jordan v. Harper* (b), and *Duthy v. Tito* (c), a plaintiff defeated in an action brought against several persons, could not be compelled to pay costs to any one singly, but might pay costs to any one of them at his election.

D. F. Jones contra, contended, First, that the affidavit was sufficient, for that the enlargement of the time would not have been made part of the rule of court,

(a) 5 B. & C. 390.

(b) 1 Str. 516.

(c) 2 Str. 1203.

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unless there had been an affidavit that it was duly made. Secondly, that it did not appear that any matters were in difference between the parties except the action, and, therefore, the award that nothing is due, must be taken to mean that the plaintiff was not entitled to recover in the action. Thirdly, that as *Jarvis* did not appear or incur any expence, either at nisi prius or on the reference, the costs were properly taxed to *Smith* alone.

BAYLEY J. I have no doubt that this plaintiff would have been liable to an attachment, but for the objection to the mode of taxing and demanding the costs. I take it to be a matter of course, that where a submission to arbitration contains a power to enlarge the time for making the award, and an enlargement of the time is made a rule of court, that is sufficient for the purpose of obtaining an attachment, just as if the award had been made within the time originally granted. This case differs from that which has been referred to, for there the time was enlarged by a judge's order, and that did not appear on the face of it to be made by the consent of the parties; it appeared to be made proprio vigore judicis, and, therefore, was not binding. Here the parties agreed that an enlargement by the arbitrator should be valid. The Court must have credit for not making it a rule of court without a sufficient affidavit. If that were otherwise, every rule for an attachment for disobedience to a rule of court, must be a rule nisi. It was next objected, that the award decided nothing as to the right of action, at the time when the submission was made. But I think the finding that nothing is due, sufficient. It is to be presumed, that things remain in statu quo, from the time of the submission,

mission, unless the contrary be shewn by affidavit; that objection, therefore, fails. The only difficulty that I feel is upon the third objection that was raised. It appears that all the costs were taxed together, at the sum of 56*l*. By the submission, costs were to abide the event; that being in favour of the defendants, the costs would accrue to them both jointly or to each separately. Whether there could be a separate taxation and a separate adjudication of costs to each defendant, I am not prepared to say; I believe that in all cases hitherto, costs have been taxed to defendants jointly, leaving the distribution to themselves. If there could be separate judgments for the costs, the plaintiff would be liable to separate executions, which would be a great hardship. But, admitting that the costs might be so taxed, I am not clear that there has been such a taxation in this case as to entitle *Smith* to claim the costs by himself. If the master had taxed the costs of the trial and the reference separately, *Smith* alone might have demanded the latter on his own account, and at the same time might have demanded the costs of the trial for himself and his co-defendant. Upon this allocatur it must be taken for granted that the master included the costs of the trial and the reference in one sum, and *Smith* does not negative the payment of those costs to *Jarvis*. Under such circumstances the rule for an attachment cannot be made absolute. Even supposing it possible to award costs separately to the different defendants, that power is so very questionable, that had it been done, we should not have been warranted in granting an attachment. The plaintiff ought to have an opportunity of putting the question upon the record. The rule must, therefore, be discharged, and no injury can be done by this, for

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if *Smith* has a right to receive the costs which have been taxed, he may bring an action to recover them.

HOLROYD and LITTLEDALE Js. concurred.

Rule discharged.

CHADWICK *against* BUNNING.

By the Middlesex court of conscience act, 23 G. 2. c. 33. s. 19. the defendant is entitled to double costs, if the jury find a verdict for less than 40s.; Held, that in such case the verdict of the jury is conclusive, and a verdict having been found for 1*l.* 13s. in an action brought to recover the amount of an apothecary's bill, the Court ordered a suggestion to be entered, although it appeared by affidavit that the debt originally exceeded 40s., and had been reduced by partial payments on account, and although the plaintiff had failed in proving some of the items in his bill.

A RULE nisi had been obtained for entering a suggestion on the roll in this cause pursuant to the statute of the 23 G. 2. c. 33. s. 19. The affidavit in support of the rule stated, that the defendant at the commencement of the suit was residing and inhabiting in the county of *Middlesex*, and liable to be summoned to the court of requests for the county of *Middlesex*; and that the plaintiff obtained a verdict for 1*l.* 13s. 1*d.* and no more. The affidavit against the rule stated that the plaintiff was an apothecary, and that the action was brought to recover 9*l.* 17s., the amount of a bill for medicine and attendance which had been delivered to the defendant at *Christmas* 1821, that that bill had been reduced by part payment to 6*l.* 5s.; that the plaintiff at the trial could only prove items in the bill to the amount of 6*l.* 5s., although the whole amount of his bill had been incurred; that the defendant admitted at the trial that 1*l.* 13s. was due to the plaintiff, and gave evidence of part payments on account to the amount of 4*l.* 2s., although, in fact, the plaintiff had never received more than 3*l.* 12s. on account; but, that even assuming that 4*l.* 2s. had been paid, there would still have remained due to the plaintiff, a sum exceeding 40s.

Russell

Russell now shewed cause. Here the original debt exceeded 40s. In *M'Collam v. Carr* (a), which was a case upon this statute, it appears to have been the opinion of *Eyre C. J.*, that a suggestion ought not to be entered in any case where the original debt, being above 40s., has by a balance of accounts been reduced below that sum, upon this ground, that if it were, the most intricate point in accounts between merchant and merchant might come to be decided in the county court. In the *South-wark* court of requests act there is a clause, that it shall not extend to any debt for any sum being the balance of an account on demand, originally exceeding five pounds. A debt originally above five pounds, but reduced under that sum by partial payments, has been held to be within the exception of that act, *Fountain v. Young*. (b) It is true, that in *Bateman v. Smith* (c), it was held that the defendant was entitled to enter a suggestion under the statute, 23 G. 2. c. 33. s. 19., in a case where the plaintiff's demand having exceeded 40s., was, at the trial, cut down below that sum by the defence of infancy. But there is no authority to shew that where the original demand being above 40s. has been reduced by payments on account, the defendant is entitled to his costs.

ABBOTT C. J. The words of the stat. 23 G. 2. c. 33. s. 19. are peculiar. They are, "if the jury upon the trial of such cause shall find a verdict for the plaintiff under 40s.," the defendant shall be entitled to recover double costs. The attention of the Court was called to the language of this statute in *Bateman v. Smith*.

(a) 1 Bos. & Pul. 223.

(b) 1 Trawl. 60.

(c) 14 East, 301.

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There Lord *Ellenborough* C.J. says, "The jury having found a verdict under 40s., the defendant is entitled to double costs by the very words of the act." I think it is not possible to put any other construction upon those words, and the jury in this case having found a verdict for 1*l.* 13s. only, the defendant is entitled to recover double costs. The rule for entering a suggestion must therefore be made absolute.

Rule absolute.

GRAZEBROOK and Another against DAVES.

Debt on bond conditioned for the performance of an award to be made on a day therein named. One of the terms of the submission was, that the arbitrator should examine the witnesses produced by the parties in difference. Plea, that the arbitrator made several appointments for proceeding with the reference,

DEBT on bond. Plea first, after craving oyer of the bond and of the condition, *non est factum*. The condition recited that differences had arisen, and were then depending between the defendant and the plaintiffs, and an action at law having been commenced in the Court of King's Bench by the plaintiffs against the defendant, and the parties being then at issue therein, and the case being set down for the *London* sittings 1824, in order to put an end to such differences and disputes, and to avoid the expence of proceeding to the trial of the suit, the parties had agreed to submit all matters so at issue to the arbitrament of *A. B.*, who was to examine the and examined witnesses produced by the plaintiff, and occupied the whole of the time of the meetings respectively in so doing; that plaintiffs, on the day when the time for making the award expired, closed their case, and defendant was called upon to enter upon his defence; that at that time an insufficient time remained for the defendant to bring forward and examine his witnesses; that he requested the arbitrator to allow him reasonable time to bring forward and examine his witnesses, which the arbitrator refused, without the consent of the plaintiffs, and which consent the plaintiffs, although requested by the defendant, refused to grant, and the arbitrator refused to allow the defendant any further time, although he had several material witnesses to examine, of which the arbitrator and the plaintiffs had notice: Held, upon general demurrer, that this plea was bad.

witnesses

witnesses to be produced by the parties, upon oath, &c.

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The condition was for the performance of the award of the arbitrator, to be made on or before the 8th of *November* then next. Second plea, that the arbitrator in the condition of the bond mentioned, after the making thereof, to wit, on the 26th day of *July* 1824, at, &c. took upon himself the burden of the reference, and afterwards and between the making of the said supposed writing obligatory, and the 8th day of *November* next ensuing the date thereof, being the day thereby appointed for making his award, made divers, to wit, six appointments for proceeding with the reference, to wit, on, &c.; and on those days and times examined divers, to wit, five witnesses brought forward to the arbitrator to be examined, touching the matters referred, by and for and on behalf of the plaintiffs, and occupied the whole of the time of the said meetings respectively in so doing, to wit, at, &c. Averment, that at the last of the said meetings, to wit, on the said 8th day of *November* 1824, the plaintiffs closed their case before the arbitrator, and the defendant was then called upon by the arbitrator to enter upon his defence thereto; that at the time the plaintiffs closed their case before the arbitrator, a short and insufficient time, and not a reasonable or proper time, to wit, twelve hours only then remained for the defendant to bring forward and examine his witnesses before the arbitrator upon the merits of his case, and the defendant then requested the arbitrator to allow to him further and reasonable time to enable him, the defendant, to bring forward and examine his witnesses, which the arbitrator refused to do without the consent of the plaintiffs; and which consent the plaintiffs, although requested by the defendant, refused to grant, and the arbitrator altogether refused to allow to the defendant any further or reason-

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able time to bring forward his witnesses to be examined before him, the arbitrator, although the defendant had divers, to wit, four material witnesses to bring forward and examine on his part and behalf, of which the arbitrator and the plaintiffs had notice. And, thereupon, the defendant afterwards, to wit, on the said 8th day of November 1824, by deed revoked his said submission, and afterwards and before the arbitrator made his award, gave him due notice of such deed. Demurrer and joinder.

Campbell in support of the demurrer. The pleas are bad, for they admit that there has been a revocation of the submission; and no event can enable the party to revoke the submission without incurring the penalty of the bond. In the year-book of the 5th Ed. 4. cited in *Vinior's case* (a), and in *Warburton v. Starr* (b), it is said, "If I am bound to stand to the award which J. S. shall make, I cannot discharge that arbitrament, because I am bound to stand to his award." In a late case of *Brown v. Tanner* (c), a revocation of a submission to arbitration before award made was held to be, in effect, a breach of an agreement to stand to abide and perform an award. There is no case or dictum where a plea of this sort has been held to be pleadable, nor a precedent of any such plea to be found in any of the books of entries. If an award had been made, and an action had been brought upon the bond for non-performance, a plea impeaching the award would not have been good. (d)

G. R. Cross contra. A revocation of the submission is not always a breach of the condition of the bond. In *Cur-*

(a) 8 Co. 162.

(b) 4 B. & C. 103.

(c) 1 Mac. & Younge, 464.

(d) 1 Wms. Saund. 228, n. 5.

tis v. Potts (a), Lord *Ellenborough* said, speaking of a general submission without any limitation of time, that it was open to the parties to have requested the arbitrators to proceed within a reasonable time, and if after such request the arbitrators had neglected or refused to proceed, the parties might revoke the authority. And if not making an award within a reasonable time after request is a good ground for revocation, a fortiori the refusal to examine witnesses after request on one side is. So in answer to an action upon the bond matter impeaching the conduct of the arbitrator may in some cases be pleaded, *Mitchell v. Staveley*. (b) One of the terms of the submission in this case was that the witnesses should be examined; but here they were not examined, and the plaintiff having occupied, in proving his own case, the whole time originally allowed, refused to consent to the allowance of further time to the defendant. Now it is a clear principle of law that if there be a feoffment on condition, the non-performance of the condition by the feoffee is excusable, if the performance of it be rendered impossible by the act of the feoffor. In *Braddick v. Thompson* (c), indeed, it was held that partiality or improper conduct in an arbitrator, in making his award, without hearing the defendant and his witnesses, could not be pleaded in bar to an action on the bond conditioned for the performance of the award, but was only matter for application to the equitable jurisdiction of the Court to set aside the award.

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BAYLEY J. That case is an authority in point. This is not like the case put of a feoffment upon con-

(a) 5 M. & S. 145.

(b) 16 East, 58.

(c) 5 East, 344.

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dition, for the plaintiff in this case has done no act to prevent the arbitrator from making his award, but the defendant by revoking the submission has done such an act. Besides, the pleas are bad in form. It is not sufficient for the defendant to say that he was ready to bring forward his witnesses, he ought to have alleged that he had them there, and to have shown all performance in his power at all events.

HOLROD J. I am of the same opinion. The plea shews a demand of more time, but there is no allegation that proof of the necessity of more time was given.

Judgment for the plaintiff.

The KING against J. S. S. COOKE.

Indictment against four for a conspiracy; two pleaded not guilty, one pleaded in abatement, to which plea there was a demurrer, and the fourth never appeared. Before the argument of the demurrer, the record was taken down to trial; one of those who pleaded not guilty was acquitted, and the other was found "guilty of conspiring with him who pleaded in abatement." The demurrer was afterwards argued, and judgment of respondeat ouster given, whereupon a plea of not guilty was pleaded: Held, that the Court might, before the trial of that defendant, pronounce judgment upon the one that had been found guilty.

THIS was an indictment against *James Stamp Sutton Cooke, Richard Stafford Cooke, James Russell Miles, and Richard Jenkinson* for a conspiracy to disquiet and disturb Sir *George Jerningham, Bart.*, in the possession of certain estates, by unlawful means and devices; to molest his tenants, and to obtain money from his tenants by falsely pretending that the title of *Richard Stafford Cooke* to the estates had been admitted by Sir *George Jerningham* to be valid. To this indictment which was found at the *Summer assizes, 1823*, and removed into King's Bench at the instance of the prosecutor; *James Stamp Sutton Cooke*, and *Richard Jenkinson* pleaded, not guilty; and

Miles

Miles never appeared. The defendant *Richard Stafford Cooke* pleaded in abatement. To this plea there was a demurrer and joinder. While the demurrer was pending, viz., at the *Spring assizes*, 1824, for the county of *Gloucester*, the issue joined between the Crown and the two defendants who had pleaded the general issue, came on to be tried, when the jury returned a verdict, which was recorded in the following terms: "*J. S. & Cooke* guilty of conspiring with his brother *Richard Stafford Cooke*; *Jenkinson* not guilty." The demurrer was argued before three of the Judges of this court at their sittings after *Easter term*, 1824, when judgment was given for the crown, and *R. S. Cooke* required to answer over to the charge; and in the following *Trinity term* he pleaded the general issue. The record was not taken down for the trial of *R. S. Cooke*; but judgment was in *Trinity term* moved for against *J. S. S. Cooke* on the conviction; and was postponed from term to term on affidavits of the defendant's illness, until *Michaelmas term*, 1825, when *Campbell* obtained a rule nisi for staying the judgment, on the ground that the verdict of the jury negatived all the conspiracy charged, except with *R. S. Cooke*, who was still to be presumed innocent, who had pleaded not guilty, and whose acquittal, if he should be tried hereafter, would be a virtual acquittal of *J. S. S. Cooke*, and render any judgment passed on him erroneous. Against this rule in last *Hilary term*.

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Taunton, *Oldnall Russell*, and *Talfourd* shewed cause. The finding of the jury, that *J. S. S. Cooke* was guilty of conspiring with *R. S. Cooke*, does not acquit him of conspiring with other persons. But supposing it to have that effect, still the Court may proceed to pass judgment

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judgment upon the defendant, who has been found guilty. All the authorities are against this application to stay the judgment. In *Rex v. Kinnersley and Moore* (a), who were indicted for a conspiracy, the former alone appeared, pleaded to issue, and was found guilty, and the Court, after argument, proceeded to sentence: and in *Rex v. Nicolls* (b), the defendant was convicted of conspiring with one *Bygrave*, who was then dead, and being found guilty, the Court passed sentence, and recognised the case of *Rex v. Kinnersley*. So, also, in *Rex v. Scott and Hams* (c), six were indicted for a riot, two died before trial, two were acquitted, and *Scott* and *Hams* were found guilty. A motion was made in arrest of judgment, on the ground that two persons alone could not be guilty of a riot. Lord *Mansfield* said, "Six were indicted, two of them are acquitted, two are dead, untried. The jury have found these two guilty of a riot, consequently it must have been together with those two who have never been tried, as it could not otherwise have been a riot;" and the rule was discharged. It is not to be assumed that the other defendants will be acquitted, merely because that is possible, and the jury having found this defendant guilty of a complete offence, even supposing the verdict to be a negation of the conspiracy with any but *R. S. Cooke*, the Court ought to pronounce judgment. There are many cases besides those already cited which warrant such a course. In *Thody's* case (d), he and two others were indicted for a conspiracy. *Thody* pleaded, and was found guilty, the

(a) 1 *Str.* 193.(b) 2 *Str.* 1227., better reported in 13 *East*, 412. n.(c) 3 *Burr.* 1262.(d) 1 *Vent.* 234.

others

others not having pleaded; and upon a motion to stay the judgment, Lord *Hale* said, "If one be acquitted in an action of conspiracy, the other cannot be guilty; but where one is found guilty, and the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon the verdict against the other." And he cited 24 *Edw.* 3. 34., which is directly in point. In *Thody's* case, the 14 *H.* 6. 25. was cited, as an authority for the defendant, but no judgment was given in that case. (a)

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Campbell,

(a) In the report of this case in the *Year Book*, 14 *H.* 6. 25 b., it is said that a writ of conspiracy was brought against two, one pleaded in abatement of the writ, the other to the action. Issue was taken on the plea in abatement, and found for the plaintiff, and the damages assessed at 60*l.* The plaintiff prayed to have judgment for those damages against him who pleaded in abatement, and offered to release the action as to the other defendant. But it was said that could not be done, as one could not be guilty of conspiracy; and then the case was adjourned. Supposing that report to be correct, the offer to release the action as to the defendant who pleaded in bar might be considered equivalent to an admission, that he was not guilty of the conspiracy; and then there would be good reason for saying, that the plaintiff could not have judgment against the other defendant. The same case is thus reported in *Fitz. Abr. Consp.* pl. 1.: "Conspiracy was brought by one against two, one pleaded in abatement of the writ upon which the plaintiff and he were at issue; the other pleaded in bar, to which the plaintiff demurred; and the issue was found for the plaintiff, and the bar found against him; and it was the opinion (sc. of the Court) that the plaintiff should have judgment against him who pleaded to the writ, although the other had been acquitted, because he was not acquitted by verdict, but by plea; and it might be that they both conspired together." This case, then, is far from being an authority for saying, that judgment cannot be given against one of two persons for a conspiracy before the other has been tried. The opinion expressed at the end of the case, if intended to be taken generally, and without reference to the matter pleaded, is somewhat singular, and is inconsistent with another case, the conclusion of which is found in 8 *H.* 4. 6. and the beginning in 9 *H.* 4. 9. That was conspiracy against one *Elcheatony* and thirteen others for conspiracy to indict the plaintiff in the *Marshalsea*. *Elcheatony* pleaded, that he was bailiff, and in obedience to

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Campbell, contra. The Court ought not to proceed now to give judgment against the defendant, who has been found guilty. The jury, by their finding, negatived the charge of conspiring with any person but *R. S. Cooke*. [*Abbott C. J.* Did *R. S. Cooke* plead not guilty before or after the trial?] After the trial; but there is neither case or dictum to be found, that where there is an indictment against two for a conspiracy both plead, and one has been tried but not the other, the Court can proceed to give judgment against the one. In *Rex v. Kinnersley and Moore* the latter had not pleaded, and, therefore, could not be tried; and although a repugnancy might afterwards have appeared on the record, had he pleaded and been tried and acquitted, yet the Court thought that very remote possibility, not sufficient cause for staying the judgment. In *Rex v. Scott and Hams* no repugnancy could appear on the record, for the two with whom the defendants were found to have committed the riot were dead, and, therefore, could not afterwards be acquitted. *Thody's* case was precisely like that in *Strange*; he was found guilty, and the other two who were indicted with him had not pleaded; and Lord *Hale* puts the two cases of co-defendants not coming in or being dead, but he does not appear to contemplate the case of a co-defendant having pleaded

to a writ from the sheriff, summoned the jury, and being in attendance on the court, was compelled to be sworn, and say what he knew of the transaction. Twelve justified, on the ground that they were jurymen, compelled by their oath and the authority of the law to do what they did. The other pleaded to issue, and was found not guilty. Upon demurrer to the other pleas, judgment was given for the twelve jurymen, and thereupon it was held, that the plaintiff could not recover against *Elchestony*, because he alone could not be guilty of conspiracy.

but

but not having been tried. So in the case cited from 24 *Edw. 3.* 34., which was a civil action, the defendant against whom the judgment was given was the only one that had pleaded. (a) In the case of principal and accessory, although the latter may be compelled to answer before the principal has appeared and answered, yet the plea cannot be tried before such appearance, or the attainder of the principal, unless he desires it himself: *Hawk. P. C. b. 2. c. 29. s. 45.* (b) [Bayley J. Suppose the accessory chooses to be tried before the principal has pleaded and he is convicted, what is the consequence?] Judgment may then be given; but here the defendant could not object to being tried separately. The law in high treason is analogous to that in felony; a person cannot be tried for harbouring a traitor until the latter has been convicted; *Foster's Cr. Law.* 348.

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ABBOTT C.J. I am of opinion that this rule must be discharged. Two points have been made in argument, first, that the jury have negatived any conspiracy between the defendant and any other persons except *R. S. Cooke*. It is by no means clear that their verdict does imply such a negative, but it is not necessary to pronounce an opinion upon that point. Leaving that question doubtful, the case stands thus. There is an indictment against the defendant now before the Court, and *R. S. Cooke* for a conspiracy; it is said that the latter has pleaded not guilty, and that this case is by that circumstance distinguished from all those which have been cited. But he first pleaded in abatement, to

(a) He was the only person against whom the action was brought, the charge being, that he and others conspired.

(b) 7th edition.

which

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which plea there was a demurrer, and he did not plead not guilty until *Trinity* term 1824. In the mean time, at the Spring assizes in that year, the record was taken down to trial, and *J. S. S. Cooke* was convicted. At that time there was no plea of not guilty by *R. S. Cooke* upon the record, nor had judgment of respondeat ouster been given upon the demurrer. Then the jury found that *J. S. S. Cooke* was guilty of conspiring with *R. S. Cooke*. It is said, that peradventure *R. S. Cooke* may be acquitted, and that then there will be a repugnancy upon the record if judgment is pronounced against the other defendant. That is certainly possible, but are we to presume that it will be so against the verdict that has been found? I think that the Court would not be warranted in coming to such a conclusion, or in forbearing to pronounce judgment upon the defendant who has been found guilty.

BAYLEY J. I am entirely of the same opinion. The question of delaying the judgment is not put by way of appeal to the discretion of the Court, but as matter of law. I consider the case of *Rex v. Kinnersley and Moore* as an authority directly in point. The very objection now made was then urged, and the report shews that *Moore* did afterwards come in and plead, for it is stated, that in *Trin. 5 G. 1. Kinnersley* was sentenced, and *Moore* in *Easter* term following, he having ad interim been tried and convicted. The verdict in the present case concludes nothing against *R. S. Cooke*, but the question is, whether it concludes the fact as against the defendant now before us, and I think that it does. It is true as stated that an accessory cannot be tried before

fore the principal, unless by his own consent, but if an accessory be tried at his own request before the principal, he is liable to sentence, although if the principal be afterwards acquitted, the judgment against the accessory falls to the ground; in the same manner as the reversal of the attainder of a principal ipso facto reverses the attainder of the accessory, *Hawk. P. C. b. 2. c. 29. s. 40.* (a) But I think we are not warranted in presuming that the other defendant in this case will be acquitted.

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HOLROYD J. I also think that the defendant *J. S. S. Cooke* is not entitled, by matter of law, to have the judgment arrested or stayed. The verdict is at the present time conclusive against him. The authorities fully prove this. The same argument *ab inconvenienti* that has been now urged, would apply if one person were indicted and found guilty of conspiring with *A.*, for then *A.* might be afterwards separately indicted and acquitted, and yet the possibility of such an event would not prevent the Court from giving judgment against the person convicted.

LITLEDALE J. I am of the same opinion. It was for the jury to consider whether the defendant, who was upon his trial, was guilty of the charge contained in the indictment. They have found that he was guilty of conspiring with *R. S. Cooke*, and that is sufficient to prevent the application of the rule of law that one cannot be guilty of a conspiracy. If the other defendant *R. S.*

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Cooke shall hereafter be acquitted, perhaps this judgment may be reversed.

Rule discharged. (a)

(a) There is a case in the *Year Book*, 18 Ed. 4. 9 B., which shews, that although the reversal of an attainder of a principal ipso facto reverses the attainder of an accessory, that is not always sufficient to relieve an accessory previously convicted. The case is as follows: "A man was indicted in the King's Bench as principal, and another as accessory, and the principal was outlawed, and the accessory was taken, and pleaded to the indictment, and was found guilty and hanged; and then the principal came in and reversed the outlawry, and was arraigned upon the indictment, as it behoved, and pleaded not guilty, and was found not guilty; and yet it cannot be intended that the accessory was guilty, inasmuch as the principal was acquitted." There is also a case in 2 R. 3. 21 B., from which it may be concluded, that it was not at that time considered at all improper to hang the accessory, although the principal might afterwards be acquitted. In the King's Bench an exigent was taken against one, of felony, as against an accessory, for this, that the principal was outlawed upon an appeal. (As to this process, see 2 Hale's P. C. 200.) It was then objected, that there was error in the outlawry, and that the accessory ought not to be compelled to answer, whereupon the following discussion took place. "*Faifax*. Although this which you speak of were error, but it seems to me that it is not, yet the accessory shall be put to answer; car il n'est inconvenient that the accessory shall be hanged and the principal acquitted. As if the principal be attainted upon an outlawry, and perchance erroneously, and then the accessory be outlawed and be taken, there he shall be hanged, and yet the other may come in after the reversal of his outlawry, and plead to the felony, and be found not guilty. So here, although it were error, yet the accessory ought to answer; for if it be error, the outlawry should be reversed by writ of error, for the principal himself could not reverse it by plea, but by writ of error; so it seems to me that the accessory should be put to answer." *Faifax* thought that the accessory should not be put to answer, unless the principal were lawfully attainted; but *Hussey C. J.* was of a different opinion; and, finally, all the justices agreed that the accessory should answer, and a day was appointed.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

1826.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Seventh Year of the Reign of GEORGE IV.

LAUGHER *against* POINTER.

CASE. The first count of the declaration alleged that the plaintiff was possessed of a horse, and defendant was possessed of a carriage, and two horses harnessed to and drawing the same, and which carriage and horses were under the care, government, and direction of a person, *being the servant of the defendant* in that behalf, who was driving the same, yet that the defendant, by his said servant, so negligently and improperly drove and directed his said carriage and horses that by the negligence and improper conduct of the defendant, by his said servant, the carriage ran and struck against the plaintiff's horse, &c. The second count differed from the first, only, by omitting to state that the defendant was possessed of the horses. The third and last count alleged that the defendant was pos-

Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person: Held, by Abbott C.J. and Littledale C.J., that the owner of the carriage was not liable to be sued for such injury, *Bayley and Holroyd J's diss.*

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essed of a carriage drawn by two horses under the care, government, and direction of the defendant, yet that the defendant so negligently and improperly drove, governed, and directed the carriage and horses that, by the negligence and improper conduct of the defendant, the carriage ran and struck against the plaintiff's horse, &c. At the trial before *Abbott C. J.* at the *London* sittings after *Michaelmas* term, 1823, it appeared in evidence that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent the pair of horses and a person to drive the same. The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose. The driver had no wages from his master, but depended upon receiving a gratuity from the persons whose carriages he drove; the defendant gave him 5s. as a gratuity for his day's work, but the driver had no power to demand any thing. The Lord Chief Justice thought that the evidence did not support the declaration, and directed a nonsuit. A rule nisi for a new trial was afterwards granted, and upon the argument, there being a difference of opinion on the bench, the case was directed to be argued before the twelve judges, all of whom (except the Lord Chief Baron) met for that purpose in *Serjeant's Inn Hall*, on the 2d of *February* 1825, when

Tindal shewed cause against the rule. The person who drove the defendant's carriage was not his servant. If that relation had subsisted, the driver ought to have had a right to demand his wages, but had the defendant refused

refused to give him any thing, there would have been no remedy in this case. The defendant could only employ him in the specific work for which he was engaged. If the relation of master and servant subsisted in this case, why should it not between the hirer of post horses for a stage and the driver, or between the hirer of a hackney-coach and the coachman? In *Chilcot v. Bromley* (a), where testator left a legacy to each of his servants, it was held that a job coachman was not entitled. The principle upon which the master is held liable for the acts of his servant is laid down in *Pothier on Obligations*, part 1. c. 1. s. 2. num. 121., *Evans' Translation*, p. 72.: "Masters are also answerable for the injury occasioned by the wrongs and negligence of their servants, &c. This has been established to render masters careful in the choice of whom they employ." So also *Molloy*, b. 2. c. 8. s. 18. states the reason why the master of a ship is answerable for the acts of the mariners to be, that they are of his choosing. In *Lane v. Cotton* (b), which was an action against the postmaster-general to recover the value of some exchequer bills which had been inclosed in a letter sent by the post, and lost, the principle as above laid down was not disputed, although Lord *Holt* differed from the other three judges in the application of it, and thought that the defendant was liable to the action: and the same principle was recognized in *Nicholson v. Mounsey* (c). It would be extremely inconvenient both to individuals and the public, if the hirer were held liable. Persons hiring job horses for a short time; as in this case, cannot have any knowledge of the driver, or any

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(a) 12 Ves. 114.

(b) 12 Mod. 488. 1 Salk. 17. Carth. 487. S. C.

(c) 15 East, 584.

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control over him, and the public would undoubtedly suffer if the liability were transferred to the hirer, probably unknown, from the owner of the horses, who may easily be discovered. In *Dean v. Branthwaite* (a), and *Sammell v. Wright* (b), it was held that where horses are let for the day the owner is liable for accidents produced by the misconduct of the drivers; and in a case tried before Lord *Ellenborough* at *Warwick*, the declaration was similar to that in the present case, and the action appearing to have been brought against the party to whom the carriage belonged (Sir *H. Houghton*), but who had hired the horses, the plaintiff was nonsuited. At the next assizes an action was tried against the owner of the horses, and the plaintiff recovered (c). The failure of one of those actions, and the success of the other is decisive of this question. It will be said that there is a difference between a hiring for a stage, or for a day, *i. e.*, between a hiring for space or for time, but if the ground of liability be that the master has the power to choose the servant, that cannot make any difference. There certainly are cases in which it has been held that persons who have hired others to perform some specific work are liable for their misconduct, although a perfect relation of master and servant was not constituted, as in *Bush v. Steinman* (d). But there the party for whom the work was done, was held to adopt all the acts done in the progress of it. If any act were done, not in furtherance of the work, but beyond the implied authority, the party for whom the work was done would not be liable. *Heath J.* certainly puts the case of a job coachman, as one in which the hirer would be liable for his acts, but that

(a) 5 *Exp.* 35.(b) 5 *Exp.* 263.(c) Cited *ex relatione Copley A. G.*(d) 1 *B. & P.* 404.

question

question was not before the Court, he cites no authority in support of that position, and it does not appear to have been adopted by the rest of the Court.

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Abraham contra. First, the coachman was the servant of the defendant. Secondly, if that was not so, still the injury having arisen through an act done for the benefit of the defendant, he would be liable according to *Bush v. Steinman*. Thirdly, this case is distinguishable from that of a hired post-chaise or hackney-coach. It appeared that no wages were paid by the owner of the horses to the coachman; he depended upon receiving a gratuity from the defendant, who, if he had thought proper, might have selected a particular person to drive him. The decision in *Nicholson v. Mounsey* proceeded on the ground, that the captain had no power to appoint the lieutenant in whose watch the accident happened. Here the defendant had power to discharge the servant, there he had not. Then, secondly, according to *Bush v. Steinman*, the master was liable for any thing done in the execution of the work for which the servant was employed. In that case it did not appear that the bricklayer's labourer was under the control of the person whose house was under repair; yet *Heath J.* says, that in law, he was to be considered as his servant; and he observes, that whatever may be the doctrine of the civil law, our law carries such liability much farther than the mere relation of master and servant. Thirdly, this is very different from the case of a post-chaise hired for a stage, or a hackney-coach. There the hirer has only a qualified use of the thing hired; he has it for a specific purpose. Here he might have ordered the coachman to drive wherever he

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pleased. The cases of *Dean v. Branthwaite* and *Sam-mell v. Wright* are consistent with this defendant's liability; they merely show that the owner of the horses is liable, not that the hirer is not also liable for any injury sustained in consequence of misconduct in the driver; and in a later case, *Hall v. Pickard (a)*, Lord *Ellenborough* held, that where horses were let on a job, they were not in the possession of the owner, and that he could not maintain trespass for an injury done to them. So in *Croft and another v. Alison (b)*, where the plaintiffs had hired a chariot for the day, it was held, that they were properly described as the owners in an action for an injury sustained by the negligence of the defendant's servant in driving against the chariot.

Tindal in reply. That case only proves that a person, having a special property in a chattel, may maintain an action for an injury done to it.

Cur. adv. vult.

And now the Judges not being agreed in opinion, proceeded to give judgment seriatim,

LITTLEDALE J. This was an action brought to recover a compensation in damages occasioned to a horse belonging to the plaintiff, and which, as he said, sustained an injury by the negligent conduct of the defendant's servant in driving a carriage and horses of the defendant. The cause was tried before the Lord Chief Justice of this Court, and the plaintiff was nonsuited. A rule nisi was afterwards obtained to set aside the nonsuit, and the Judges of this Court not being agreed in opinion, and the case being one of difficulty and of ex-

(a) 3 Comp. 187.

(b) 4 B. & A. 590.

tensive consequences, it was argued in *Serjeants' Inn* before all the Judges, except the Lord Chief Baron of the Exchequer, and there being a difference of opinion amongst the other Judges, it now remains for the Judges of this Court to deliver their judgment upon the case. The plaintiff was owner of the horse that was injured, the defendant was owner of the carriage, and he having occasion to use it, applied to a jobman, who supplied him with a pair of job-horses and a coachman for a day. The jobman did not give anything to the coachman for the day's work, but the defendant paid him 5s.; this 5s. was not, however, paid in pursuance of any contract or engagement either with the jobman or coachman, but was merely given as a gratuity to the coachman, who had no employment relative to any business of the defendant except the driving of the carriage in question. In the course of driving the carriage, the coachman by his negligent conduct occasioned the injury; and the question for the consideration of the Court is, whether the defendant be liable. According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence; and he is also answerable for acts done by the negligence of those whom the law denominates *his* servants, because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant. For the acts of a man's own domestic servants there is no doubt but the law makes him responsible, and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master either personally

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ally or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him.

This rule applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself or by a person specially deputed by him, if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under workmen, and he pays them on behalf of the owner. These under workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer. This, however, is not the case of a man employing his own immediate servants, either domestic servants or others, engaged by him

him to conduct any business, or employment, or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired to the defendant; he had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they are not the less the servants of the innkeeper; they are not servants upon wages, but servants upon expectation of gratuities. And, therefore, if the defendant is in this case to be answerable for the acts of the driver provided by the job-man, it must be upon this principle, that if a man either for his benefit or pleasure employs an agent to conduct any business, such agent is to be looked upon in the same light as if he was the immediate servant of the employer, and that the owner of the property by employing such an agent to transact his business, confides to him the choice of the under workmen, and then the principle must go on to this, that such agent and under workmen are to be considered in the same light as the foreman or manager of a person in conducting his business, and as the workmen selected by such foreman or manager; and that it makes no difference to persons who receive an injury in what light the offending party stands to the principal, whether as an under workman employed by an agent, or an under workman

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workman employed by the foreman of the principal. And that the only thing to be looked to is, whether in the end the principal pays for the employment in the course of which the injury is occasioned.

But I think that, upon principle, this rule cannot be carried so far. In *Bush v. Steinman* (a), indeed, Mr. Justice *Heath* expresses it as his opinion, that if a person hires a coach upon a job, and a job coachman is sent with it and does any injury, the hirer of the carriage is answerable. That is certainly entitled to great weight, as being the opinion of a very able judge. It was, however, only an obiter dictum, and in a case where, like the present, there is a difference of opinion amongst the judges, the question must, if possible, be determined upon principle and decided cases. If a man charters a ship for a voyage or for time, and the master and mariners are appointed by the owner, this ship is employed for the benefit and for transacting the business of the charterer, just the same as if he had a ship of his own employed in the same service, and it might be said that he deposes to the owner the selection of the master and mariners; but in such a case the law has never considered the charterer liable to third persons for the negligence of the master and mariners. In *Fletcher v. Braddick* (b), the owners had chartered the vessel to the commissioners of the navy, who were to put an officer on board, under whose direction the master was to act, and though there was a king's pilot on board, yet the owners were nevertheless held liable for running down the plaintiff's ship. In *Nicholson v. Mounsey* (c), a captain of a man of war was held

(a) 1 Bos. & Pul. 407.

(b) 2 N. R. 182.

(c) 15 East, 384.

not liable for the default of the lieutenant whose watch it was when an injury was committed. Suppose a man has a ship or a carriage or other thing to repair, and he, instead of having the repairs done on his own premises and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed; these are employed by a person who may be considered the agent of the principal, and yet the law would not hold the principal liable. If a man hires a carriage and horses to travel from stage to stage, the carriage and horses are employed for the benefit or pleasure of the traveller, instead of using his own, which he may not do either from inability to keep horses or a desire of expedition, and yet the law has never considered the traveller liable. There is no difference in principle between a man's travelling by the stage or travelling by the day. In one case and the other the traveller is using the carriage and horses for his benefit; he pays so much by the day instead of so much by the mile; he pays the coachman a gratuity in one case, and the postilion in the other case, and yet the traveller has never been held liable. As to this latter point, there are some decisions in point. *Sammell v. Wright* (a), where the horses were hired to go to *Windsor*, and the owner of the horses was held liable, because they were under the care and direction of his servants. The carriage belonged to the traveller, who was the Marchioness of *Bath*. The case of *Dean v. Branthwaite* (b) arose on a dispute between the owner of the carriage and the owner of the

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(a) 5 *Exp.* 263.(b) 5 *Exp.* 35.

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horses, which were hired to go to *Epsom*. Lord *Ellenborough* says, a person who hires horses under such circumstances has not the entire management and power over them, but that they continue under the controul and power of the stable-keeper's servants who were entrusted with the driving; and that he would be answerable for any accident occasioned by the post boy's misconduct on the road, and then he mentions a case which had occurred of that kind. In this case, also, the party travelling had his own carriage. The same rule would apply to a hackney-coach; a man, instead of hiring his own carriage and servants, employs a hackneyman to drive him; there it is for the profit or convenience of the person riding in the coach, and yet the person so riding is not liable.

The cases referred to before Lord *Ellenborough* only shew, indeed, the owner of the horses to be liable, but it may be said the traveller is liable also. I think not. The coachman or postillion cannot be the servant of both. He is the servant of one *or* the other, but not the servant of one *and* the other; the law does not recognize a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you cannot have two separately liable; you must bring your action either against the principal, or the person who commits the injury, *Stone v. Cartwright* (a). There it was held that an action for an injury sustained through the improper working of a mine, must be brought against the owner of the mine, or against the workmen who did the injury, but that it could not be brought against an agent who hired the workmen.

(a) 6 T. R. 411.

The allowing two principals to be severally liable would tend to a multiplicity of actions, because if the traveller was liable, he might have an action against the stable-keeper for supplying improper drivers and horses, and then the stable-keeper might have an action against his own drivers. If, indeed, several persons are concerned in a trespass, or other tortious act, they are liable jointly or severally, at the election of the party injured, but the several liability arises from the joint liability, and from the rule of law that a party injured need not sue all who are guilty of the wrongful act; but what I say is, that two persons cannot be made separately liable at the election of the party suing, unless in cases where they would be jointly liable: and there cannot be any ground for saying that the hirer of the horses and the job-man would be jointly liable. There are, however, cases which have been determined upon principles not altogether consonant to what I have before considered are those upon which the liabilities of parties should be determined, where persons have been held liable for the negligence of individuals who were not their own immediate servants, but the servants of agents whom they had employed to do their work. In *Bush v. Steinman* (a) the owner of a house had employed a surveyor to do some work upon it: there were several sub-contracts, and one of the workmen of the person last employed put some lime on the road, in consequence of which the carriage of the plaintiff was overturned; and it was held that the owner of the house was liable, though the person who occasioned the injury was not his own immediate servant. So in *Sly v. Edgley* (b) a person had employed a bricklayer to make a

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(a) 1 Bos. & Pul. 404.

(b) 6 Esp. 6.

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sewer, who left it open; in consequence of which the plaintiff fell in, and broke his leg. The person who employed the bricklayer was held liable, upon the principle of respondeat superior, that he had employed the bricklayer, and was answerable for what he had done. These cases appear to establish that in these particular instances the owner of the property was held liable, though the injury were occasioned by the negligence of contractors or their servants, and not by the immediate servants of the owner.

But supposing these cases to be rightly decided, there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. But as to *Bush v. Steinman* (a), there are some observations to be made. Lord Chief Justice *Eyre*, in the first place at Nisi Prius, was of opinion the action was not maintainable; and when the case came before the Court, he says in the beginning of his judgment, "that he finds great difficulty in stating with accuracy the grounds on which

(a) 1 Bos. & Pul. 404.

it is to be supported. The relation of master and servant as commonly exemplified in actions brought against the master is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." And in the conclusion he also says, that he still feels difficulty in stating the precise principle on which the action is founded. This case, therefore, does not rest upon the same basis as it would if no such doubt had been expressed. The case is mainly grounded upon that of *Littledale v. Lord Lonsdale*; but in that case the defendant had a foreman or steward paid by him, and he engaged all the under-workmen, who were paid out of the funds of the defendant. All the machinery and utensils belonged to the defendant, and all the persons employed were his own immediate servants, just as much as his domestic servants engaged and hired by his house steward. There is the case of *Leslie v. Pounds*(a), which has some resemblance to the last cases. Lord Chief Justice *Mansfield* says that it is a very singular case. The tenant of a house was bound to repair it, but the landlord superintended the repairs; and, on being remonstrated with by the commissioners of pavement as to the dangerous state of the cellar, had promised to take care of it, and had put up some temporary boards as a protection to the public, but they proved insufficient; and an accident having happened, he was held liable. That was decided on the ground of the defendant's personal interference about his own property. It may be said that the defendant in the present case was owner of the carriage, and that therefore the principles of these

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(a) 4 TOWN 619.

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latter cases apply; but, admitting these cases, the same principle does not apply to personal moveable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is entrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Moveable property is sent out into the world by the owner to be conducted by other persons: the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it. And in the instances of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons, who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. And I think that there cannot be any difference, in point of law, as to the liabilities of these persons arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do if it had been sent to be repaired by a coachmaker who, in the course of repair, had occasioned any damage to other persons; but if the injury arises from the driver, it is he, or the person who appoints him, that is to be respon-

responsible. It may be said that, according to this doctrine, a person who hired job-horses and a coachman for a year would not be answerable for the negligence of the coachman: if the coachman remain the mere servant of the jobman, not otherwise employed in the service of the hirer, I think the hirer would not be liable for whatever time he hired the coachman and horses; but where the coachman is hired for a year, it will very often happen that he is employed in other services besides the mere attention to the coach and horses; and if, by such circumstances, he becomes the servant of the hirer, besides being the servant of the jobman, the case might then admit of a different consideration. In *Chilcot v. Bromley* (a) testator bequeathed to all his servants 500*l.* each; and it was held, that a coachman supplied by a jobmaster, together with a carriage and horses which were hired by the year, was not entitled to be considered a servant.

This, however, is not the case of a servant employed for a year or a month, and upon the whole of the circumstances of this case, I am of opinion that this defendant is not liable for the damage that has occurred, and that the rule for setting aside the nonsuit should be discharged.

There are many cases where questions have arisen upon the liabilities of postmasters, of captains of ships of war, and of owners of ships who have taken pilots, and of factors who have acted for their principals, and others, as to what degree of possession is kept by the owner. These I have not thought it necessary to notice, because I think the sole question here is, whether if a man employs another to do work respecting per-

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PORTER.

(a) 12 Fca. 114.

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sonal moveable property, and that other furnishes a servant, that servant is to be considered in the same light as a servant appointed by the person himself.

HOLROYD J. This was an action on the case to recover a compensation in damages for an injury done to the plaintiff's horse, by the negligent driving of a barouche or carriage and horses. (The learned Judge then stated the pleadings, and proceeded as follows:) In proof of this declaration, it appeared in evidence, that the defendant, at the time when the accident happened, was riding in a barouche, being his carriage, which was drawn by a pair of horses, driven by a person pursuant to the defendant's orders. The driver and horses being hired by the defendant of one *Bryant*, for a day, to go where the defendant pleased; for hire, to be paid by the defendant to *Bryant*, and for which driving the defendant afterwards voluntarily paid the driver a gratuity of 5s., and the question on the trial was, whether the defendant under such circumstances was by law answerable in this action for the negligence of the driver, as his servant, in such driving. It was contended in the argument, not only that the defendant was not responsible for the driver, but that the plaintiff could not recover on this declaration, each count of which contained as a material allegation that the act was done by the defendant's servant, whereas the driver could not be considered as his servant. But my mind has come to the conclusion, that the defendant is responsible for the driver's negligence, and responsible too upon this declaration, the driver being to be considered, in my opinion, for this purpose as, in law, his servant. It appears to me, that the defendant stands in the same situation of responsibility as if the horses had been

been driven by *Bryant* himself, or as if they had been driven by a person chosen by the defendant himself, for the driving is equally under the authority and orders of the defendant, and equally for his profit, benefit, or pleasure, and the driver is, I think, equally the defendant's servant for that purpose, whether the driver be *Bryant* himself, the person directly hired and employed by the defendant, or be another person selected and appointed by the defendant himself, or a person selected and appointed by *Bryant* under the authority or permission of the defendant. The question is not whether *Bryant*, as the owner of the horses and the immediate master of the driver, might or might not have been made responsible for the driver's negligence, nor is this the case of a letting for a particular purpose only, such as going to a particular place, as in *Dean v. Branthwaite* (a), and *Sammell v. Wright* (b), where the hirer was considered not to have the entire management and control over the things so hired; from which cases the present is distinguishable, because the present hiring was for no such particular purpose, but to go with the carriage where the defendant chose, and to be under his general authority and orders in that respect for a certain time. By such a letting for a certain time the defendant became possessed in law of the horses so let to him whilst he was using them under such letting. It would be so clearly, if they had not been retained in the custody of a driver provided by *Bryant*, according to the doctrine of Lord *Ellenborough* in *Lotan v. Cross* (c), where he says, "shew a letting" (sc. of the chaise) for a certain time to *Brown*, and

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 against
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(a) 5 Esp. 35.

(b) 5 Esp. 263.

(c) 2 Camp. 464.

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the possession would be in him;" and in *Hall v. Pickard* (a), where by the horses being let to hire to Dr. Carey for a certain term, he, and not the owner, was deemed to be the person in possession of them, as he Dr. Carey had a right to retain them till that time was expired, though in that case indeed Dr. Carey is stated to have been driving them by his own servants when the mischief was done. But in the present case, although the horses were continued in the custody of a driver provided by Bryant, yet as the horses and the driver were to be for the use and subject to the general directions of the defendant, and as the defendant had a right to retain them till the time for which they were hired was expired, and as they were at the time the mischief was done in the use and under the directions of the defendant, I think that the driver was for this purpose in the employ, and in law, the servant of the defendant, and that the defendant was in law answerable for the driver's negligence in the execution of the defendant's orders in such employ, in whatever situation the driver might also stand with respect to Bryant, with regard to Bryant's responsibility for him, at the election of the plaintiff. A person may stand in the relation of servant to two different persons as his masters in two different respects with regard to the same thing, and this even though the service done, or to be done, be special and limited to a single act, as appears in 2 Roll's Abr. 536. pl. 14.; though that indeed was a case in which the party employing the officer, who was considered as his servant, would not be responsible for the conduct of the officer as his servant, but that would be so on account of the duties and

(a) 3 Camp. 187.

obligations upon the officer, and upon grounds not applicable to the question of the defendant's responsibility in the present case. There it is said, "If a serjeant of *London*, or bailiff in a county, take a man upon a *capias* in process at my suit, and *J. S.* rescue him out of his possession, I may have a general writ of trespass against him, because the serjeant is as well my servant to this purpose as the servant of the king;" (that is, as it is expressed in *Hobart*, 180. minister as well to the person suing out the process as to the court;) "and therefore the taking out of the possession of the serjeant, who is my servant, is a taking out of my possession." *Tr. 18. Ja. entre Wheatley and Stone*, adjudged in a writ of error at *Serjeant's Inn*. So in the present case, I think the horses were to be considered in law as in the possession of the defendant, and the driver as the defendant's servant, for the purpose for which he was sent to the defendant; and I think, that a taking of the horses or driver away from the defendant's service during the time for which he had hired them, would have been a taking them away from him, for which he might have maintained an action of trespass, as for a taking them out of his possession and service; and, consequently, that he was answerable for the driver's negligence in driving him, the defendant, whilst under his, the defendant's, orders, and it is to be considered, I think, as the defendant's driving of the carriage and horses by his servant. That the responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen, is established by the case

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of *Bush v. Steinman* (a), where the owner of a house having contracted with a surveyor to repair the house for a stipulated sum, and the surveyor having contracted with a carpenter to do it, who employed a bricklayer, who contracted for a quantity of lime with a lime burner, the owner of the house was held responsible for the damages occasioned by the lime burner's servants improperly laying that lime in the high road. The principles on which that case was decided apply, I think, directly to the present case, and shew the responsibility of the present defendant; and, indeed, *Heath J.* puts the very case, that where a person hires a coach upon a job, and a job coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though (as the judge is there made to say), he is not his servant. But under the circumstances of the present case the defendant was, I think, liable for the negligence of the driver as his servant, driving the defendant pursuant to his orders, (the driver being, in law, his servant, in my opinion, for that purpose according to the declaration,) and, consequently, that the nonsuit ought to be set aside and a new trial granted.

BAYLEY J. The question in this case is, whether the owner of the carriage is answerable for the negligence of the driver. This is not the case of a driver, where, according to established usage, carriage and horses and driver belong, not to the person driven, but to another master, who may easily be discovered, as in the case of a hackney-coach; nor is it the case of a driver, where, according to established usage, neither horses or

(u) 1 Bos. & Pul. 404.

driver belong to or are commonly in the service of the person driven, but belong to another master, who is either known, or may easily be discovered, as in the case of post-horses; but it is the case of a person who hires a pair of horses for the day to draw his own carriage, and leaves it to the owner of the horses to send such person to drive them, as such owner may think fit. There is nothing from usage or otherwise to imply that the horses are not the defendant's, and the driver his regular servant; nothing to designate or to make it easy to discover to whom the horses and driver belong. The general rule in the case of master and servant, as laid down in *Boson v. Sandford* (a), is, that the man who employs another is answerable for him. Had the defendant hired the driver, can there be a doubt but that he would have been defendant's servant? If he leaves it to the owner of the horses to hire him, is he not, in substance, hired by the defendant? If I hire horses of A. and hire B. to drive, B. is undoubtedly, for the time, my servant. Is the driver less my servant for the time, because I hire him and the horses under one bargain, and allow the owner of the horses to select him? He is employed for me; that cannot be disputed. He drives where I direct, and so as I require nothing contrary to my contract with the owner of the horses, he must obey my reasonable commands. He must go where I order; must stop where I require; must go the pace I specify. Though the owner of the horses is, to a certain extent, his master, I am, to a certain extent, his master also. Though the former is his master in general, he has, for a time, let him out to me; and a master is liable for the acts of one who is in his service

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(a) 2 Salk. 440.

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or employ, though the master who is to be charged is not his *immediate* employer, but employs him through the medium of another. If I hire the driver, I am answerable for him, if I employ *J. S.* to hire him, am I not still answerable? I exercise my own judgment in the one case, I leave it to *J. S.* to exercise a judgment for me in the other, but still it is for me that the judgment is exercised. The service is performed for me. It is my work the driver does. In *Bush v. Steinman (a)*, the man who did the wrong was not selected by the defendant, was not immediately employed by him, he was only employed through the medium of one who contracted to do the work for the defendant, but he was doing the defendant's work. He was (through the medium of the contractor indeed, but still he was) working for the defendant, and on that account the defendant was held liable. "If a deputy has power to

make servants, the principal will be chargeable for their misfeasance, for the act of the servant is the act of the deputy, and the act of the deputy is the act of the principal." Per *Holt C. J.* in *Lane v. Cotton. (b)* The owner of a ship is answerable for the misfeasance of mariners, though he leaves it to the master to select the crew. The owners of a coach will be liable, though they leave it to *J. S.* to select the driver and horses, or though they employ as driver the man who owns the horses. In many instances one proprietor hires a coach for one stage, another for a second, and so on, and in some instances the man who finds the horses, finds the coachman also. Shall this take away the liability of all the proprietors? Shall it be said, if

(a) 1 *Bos. & P.* 404.(b) 1 *Ld. Raym.* 656.

the coach does an injury upon a given stage, that the proprietor who finds the horses and driver for that stage shall alone be answerable? The horses and driver are found by the one to do the work of all, they are employed upon the work and for the benefit of all, and therefore all are responsible. Nor does it appear to me to make any distinction whether the driver and horses are hired for a single day only, or for a longer period. Had they been hired by *the year*, can there be a doubt but that the hirer would have been answerable? What if they had been hired for a month or for a week? Would the difference of period for which they were hired make a difference in the responsibility? Can any legal principle be adduced to make the period the criterion of being answerable or not? The driver is equally employed on account of the hirer, to do the work of the hirer, to obey the lawful commands of the hirer, and to be the temporary servant of the hirer, whether he is engaged for the day, the week, the month, or the year, and the hirer bears the appearance for the time of standing in the relation of master to the driver, and these are circumstances which in my judgment make the hirer responsible. Upon these grounds, therefore, that the driver in this case was in the temporary employ and service of the defendant, and that this is not a case in which according to the known and established course of proceeding, *it is notorious* that the person *driven* does not stand in relation of master to the driver, and it is matter of easy discovery who does stand in that relation, as in the cases of hackney coaches and post horses; and that there was nothing in this case to rebut the *prima facie* presumption that the horses were the defendant's, and the driver his servant, I am

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of opinion that this defendant was liable to the action, and that the nonsuit was wrong.

ABBOTT C. J. This was an action upon the case brought to recover damages for an injury done to a horse of the plaintiff by the negligent driving of a carriage against it in one of the streets of *London*. (The Lord Chief Justice, after stating the pleadings, proceeded as follows:) At the trial before me the plaintiff was nonsuited; a rule was obtained for setting aside the nonsuit, and the case was argued first in this court, and afterwards before us and the judges of the other courts at *Serjeants' Inn*; but a difference of opinion has existed both in this court and among the other judges.

I take the question to be, whether either of the counts in the declaration was sustained by the evidence given at the trial. The evidence given was that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent a pair of horses and a man to drive them, being the horses and driver mentioned in the declaration. The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose.

I thought at the trial that the driver could not be considered as the servant of the defendant, so as to sustain either of the first two counts; and also that the horses were not under the care, government, and direction of the defendant, nor driven, governed, and directed by him, so as to sustain the last count. And, with all due respect for such of my learned brothers, both in and out
of

of this court, who think otherwise, I must say that I still entertain the same opinion.

I will first advert to the authorities quoted on the one side and the other. The decisions cited for the plaintiff were, the judgment of the Court of Common Pleas in *Bush v. Steinman* (a), as furnishing a principle; and the observation of Mr. Justice *Heath*, referring to a supposed case like the present, and assuming that the owner of the carriage would be answerable. *Hall v. Pickard* (b), and *Croft v. Allison*, (c)

On the part of the defendant were cited *Chilcot v. Bromley* (d), *Dean v. Branthwaite* (e), *Sammell v. Wright* (f), and the case of Sir *Henry Houghton*, before Lord *Ellenborough*, at *Warwick*. Reference was also made to *Pothier's Treatise on Obligations*, part 1. No. 121.

Bush v. Steinman was an action against the owner of a house, under repair and not inhabited, for causing a quantity of lime to be placed on the high road, whereby the plaintiff's chaise was overturned and damaged. The defendant, who had never occupied the house, had contracted with a surveyor to repair it for a fixed sum. The surveyor contracted with a carpenter to do the whole, the carpenter employed a bricklayer, the bricklayer contracted with a lime-burner for a quantity of lime, and the servant of the latter laid the lime in the road. At the trial before Lord C. J. *Eyre* the plaintiff was nonsuited, but his Lordship afterwards changed his opinion, and concurred with the other judges of the court in granting a new trial, though he confessed he found a difficulty in stating with accuracy the grounds on which

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(a) 1 *Bos. & P.* 404.(b) 3 *Camp.* 187.(c) 4 *B. & A.* 590.(d) 12 *Ves.* 114.(e) 5 *Esp.* 35.(f) 5 *Esp.* 263.

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the action could be supported. He appears, however, to have been influenced chiefly by the two cases of *Stone v. Cartwright* (a), and *Littledale v. Lord Lonsdale* (b). These were actions for injury done to a dwelling-house, by the improvident working of a colliery under it. In the first case the owner of the colliery was an infant; the action was brought against an agent and manager, appointed by the Court of Chancery, who hired and dismissed the workmen at his pleasure, but took no personal concern, was not present, and had given no particular directions for working the mine in the manner that occasioned the mischief. The defendant in this case was held not to be answerable; and Lord *Kenyon* said, I have always understood that the action must be brought against the hand committing the injury, or against the owner for whom the act was done. The latter was an action against such owner, and was held maintainable. These cases establish the principle, that the owner of a mine is answerable to the person whose property may be injured by the improvident manner of working it. And if to these we add the case of *Bush v. Steinman*, the principle will be carried no further, it will only be applied to the owner of a house, and render him answerable for an improvident act taking place in the repair of it. The case of *Hall v. Pickard* was a question as to the proper form of action, whether trespass or case. It was an action for injury to a horse belonging to the plaintiff, but let by him for a term to a gentleman whose carriage it was drawing, and by whose servant it was driven. And it was held, that case and not trespass was the proper

(a) 6 T. R. 411.

(b) 2 H. Bl. 299.

form of action; for the plaintiff had neither the legal nor actual possession of the horse, so as to maintain trespass. The case of *Croft v. Allison* was an action for injury to a carriage. The plaintiff, a stable-keeper, had hired the carriage of a coachmaker for a day; had furnished horses, appointed a coachman, and then let it out to a third person for the day. Under these circumstances it was held, that the plaintiff was the proprietor of the carriage pro tempore.

On the other hand, the case of *Dean v. Branthwaite* was decided upon the principle, that the owner of horses let to draw the defendant's carriage to *Epsom* races, under the conduct of postillions appointed by the plaintiff, had not thereby put the horses into the possession of the defendant, so as to preclude himself from maintaining an action of trespass against the defendant for an injury done by him to one of them. The case of *Sammell v. Wright* was an action brought against a stable-keeper, who had let four horses in the usual way, to draw a lady's carriage to *Windsor*, and the defendant was held liable to the action. The case of *Sir Henry Houghton* was that of horses hired by him to draw his carriage, travelling post, and he was held not to be answerable. It is true, that all the three were decisions at *Nisi Prius*, but they were the decisions of a very great Judge, and were not afterwards brought before the Court. The case of *Chilcot v. Bromley* was a suit for a legacy, under a will, whereby a legacy was given to each of the testator's servants. The testator hired a carriage and horses for a year of a job-master, who also supplied a coachman, and paid him 9s. a week. The testator paid him 12s. a week for board wages, and he received a livery with the other men servants. The question

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question was, whether this coachman was a servant of the testator within the meaning of the will. The Master of the Rolls held that he was not; and appears to have founded his judgment principally on the ground that there was no contract between the testator and the coachman, the contract being with the job-master, who might change the coachman, if he should think fit, without a breach of his contract, if he substituted another, of whom the testator could not have reason to complain.

Upon this review of the decisions, they appear to me to predominate in favour of the defendant. The three cases of *Stone v. Cartwright* (a), *Littledale v. Lord Lonsdale* (b), and *Bush v. Steinman* (c), do not in my opinion afford a rule by which the present case ought to be governed. Whatever is done for the working of my mine or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another. But does it follow from this that I have the care, government, or direction of horses hired by me of another person, who sends a servant of his own choice to conduct and manage them, because I have hired the horses to draw my carriage?

The opinion given by Mr. Justice *Heath* on this subject, in the case of *Bush v. Steinman*, was extra-judicial. It has the weight properly belonging to the opinion of a very learned Judge, but it could not be revised, and has not the authority of a judgment. The cases of

(a) 6 T. R. 411.

(b) 2 H. Bl. 299.

(c) 1 Bos. & Pull. 404.

Dean v. Branthwaite (a) and *Sammell v. Wright* (b), and the case of *Sir Henry Houghton*, were decisions at Nisi Prius, but they were the decisions of a very learned Judge; they were capable of revision: they were not afterwards questioned; and the last of the three bears directly upon the question in the present case.

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 against
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Having made these remarks upon the former cases, I will now proceed to make some observations upon the case as it might stand independent of prior decisions. I admit the principle, that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given to them, and, also, (which is the same thing in other words,) that whatever is done by his authority is to be considered as done by him. I am sensible of the difficulty of drawing any precise or definite line as to time or distance. But I must own that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about *London* for a day, and hiring them to draw it for a stage on the road I am travelling, the driver being in both cases furnished by the owner of the horses in the usual way; nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions, and hiring a carriage with them of their owner. If the hirer be answerable in the present case, I would ask on what principle can it be said that he shall not be answerable if he hires for an hour or for a mile? He has the use and benefit *pro tempore*, not less in the one case than in the other. If the hirer is to be answerable when he hires the horses only, why should he not be answerable if he hires the carriage with

(a) 5 *Esp.* 35.(b) 5 *Esp.* 265.

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them? He has the equal use and benefit of the horses in both cases, and has not the conduct or management of them more in the one case than in the other. If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between hiring them with or without a carriage, must not the person who hires a hackney-coach to take him for a mile, or other greater or less distance, or for an hour, or longer time, be answerable for the conduct of the coachman? Must not the person who hires a wherry on the *Thames* be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked if any one should affirm the hirer to be answerable in either of these cases. Will it be said that the hirer is not answerable in either of these cases because the coachman and the wherryman are ready to attend to the call of any person who will employ them? I answer, So, also, is the stable-keeper. If it be said that they are obliged to obey the call of any person when they are on the stand, or at the stairs, I would ask, Will there be any difference if they are spoken to beforehand, and desired to attend at a particular hour? which is not an unusual occurrence where persons have an engagement to go out at an early hour in the morning. If the personal presence of the hirer will render him responsible, why should he not be equally so if he is absent, and has hired the horses or carriage for his family or servants? Does his presence give him any means of superintending or controlling the driver? Can any legal obligation depend upon such minute distinctions? If the case of a wherry on the *Thames* does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the
ocean

ocean to carry such goods as the charterer may think fit to load, and such only. Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer, though he is to some purposes the dominus pro tempore, and the voyage is made not less under his employment, and for his benefit, whether he be on board or not, than the journey is made under the employment, and for the benefit of the hirer of the horses. Why, then, has the charterer of the ship, or the hirer of the wherry, or the hackney-coach, never been thought answerable? I answer, Because the ship-master, the wherryman, and the hackney-coachman have never been deemed the servants of the hirer, although the hirer does contract with the wherryman and the coachman, and is bound to pay them, and the pay is not for the use of the boat, or horses, or carriage only, but also for the personal service of the man. In the case now before the Court, the hirer makes no contract with the coachman: he does not select him; he has no privity with him; he usually gives him a gratuity, but he is not by law obliged to give him any thing; and from thence I conclude that the coachman is not the servant of the hirer. And if the coachman is not the servant of the hirer on such an occasion, but is chosen and entrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses. If the coachman is in such a case the servant of the hirer, he may, at any moment, require him to quit the charge of the horses, and deliver them over to another, and must be obeyed;

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 against
 PORTER.

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against
POINTER.

but I think it cannot be said that the coachman may not lawfully refuse, and ought not in most cases to do

so. It does not seem to be doubted that the injured party may sue the owner of the horses; is there, then, any rule of law, or any principle of convenience, requiring that he should have his choice of suing either the stable-keeper or the hirer at his election. Generally speaking, the one is as well able to pay damages as the other, and may be as easily found out and known, and more easily if the carriage and horses are hired together. Should the hirer be held responsible in the first instance, he must certainly have his remedy over against the letter, so that the letter will in the end be answerable, and there will be a circuity of action, which is inconvenient, and to be avoided if possible.

I have acknowledged the difficulty of drawing a line with reference to time or distance; and I think we must look to other circumstances in order to ascertain the obligation of the hirer. Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman. The payment of board wages and the furnishing a livery may also be circumstances worthy of attention, because they also may in some cases be considered as evidence of a choice and a contract. I do not pronounce upon any case of this kind. I speak only of the present case, and of the evidence given at the trial; and not being able to find any reason satisfactory to my own mind, by which the defendant in this cause can be made answerable in the present action, I think myself bound to say that, in my opinion, the rule for setting aside the non-suit ought to be discharged.

Rule discharged.

1826.

COLLINS *against* LIGHTFOOT.Friday,
May 26th.

A RULE had been obtained calling upon the plaintiff to shew cause why the bail-bond taken in this case should not be given up to be cancelled, upon filing common bail. The rule was obtained upon an affidavit that defendant, in 1820, was discharged under the act for relief of insolvent debtors; that he inserted in his schedule a sum of 1167*l.*, being the amount of 600*l.*, the consideration money mentioned in an indenture bearing date 5th *October* 1810, whereby an annuity was granted by one *E. M.* to the plaintiff, and also the principal sum mentioned in a bond, wherein defendant became bound with the said *E. M.* for payment of the annuity; that notice was given to plaintiff, and defendant duly discharged, and afterwards arrested by the plaintiff for four years' arrears of the annuity accruing after his discharge.

Where a party had joined in a bond with the grantor of an annuity, to secure the payment of it, and afterwards obtained his discharge under the insolvent act, having duly inserted the bond in his schedule: Held, that he could not be arrested upon the bond for arrears of the annuity afterwards becoming due.

Hutchinson shewed cause, and contended, that the 1 G. 4. c. 119. s. 10. did not apply to sureties, but only to principals, and, consequently, that defendant could not, by his discharge under that act, be relieved from his responsibility. The bond could not be enforced against the surety until the principal made default; and therefore s. 28. of the 1 G. 4. c. 119. leaves the plaintiff's rights untouched by the discharge; for that only says, that after a party has been discharged, no execution shall issue upon any judgment before then obtained against him, for any debt or cause of action arising be-

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fore his imprisonment. The 3 G. 4. c. 123. s. 13. does not vary the case. In *Baxter v. Nichols* (a) the party arrested was treated as principal, and on that account held to be discharged by bankruptcy and certificate.

D. Pollock contra, was stopped by the Court.

ABBOTT C. J. We must assume that the bond given in this case was in the common form; and that there was nothing said in it to shew which was the principal and which was the surety. The money now sued for was at the time of the defendant's discharge money payable by way of annuity at a future time by virtue of the bond, and I think that the statute 1 G. 4. c. 119. s. 10. (b) entitles the defendant to his discharge.

Rule absolute.

(a) 4 *Trent*. 90.

(b) Whereby it was enacted, " That all and every creditor and creditors of any such prisoner, for any sum or sums of money payable by way of annuity or otherwise at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, may be and shall be entitled to be admitted a creditor or creditors, and shall be entitled to receive a dividend or dividends of the estate of such prisoner, in such manner and upon such terms and conditions as such creditor or creditors would have been entitled unto by the laws now in force if such prisoner had become bankrupt; the amount upon which such dividend shall be calculated, and the terms and conditions on which the same shall be received, being first settled by the court, and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by a creditor under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission."

1826.

ELMORE *against* KINGSCOTE.

INDEBITATUS assumpsit for horses sold and delivered. Quantum valebant. Plea, non-assumpsit. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after last term, it appeared that this was an action brought to recover the price of a horse alleged to have been sold to the defendant. Proof was given that on the 13th of *June* there was a verbal contract of sale made between the plaintiff and defendant, by which the plaintiff had agreed to sell to the defendant the horse, warranted five years old, for the sum of 200 guineas. In order to take the case out of the statute of frauds, the plaintiff gave in evidence the following letter, written by the defendant on the 18th of *June*: "Mr. *Kingscote* begs to inform Mr. *Elmore*, that if the horse can be proved to be five years old on the 13th of this month, in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. *K.* will most decidedly have nothing to do with him." The Lord Chief Justice was of opinion that this was not a sufficient note or memorandum in writing of the bargain within the statute of frauds, and he directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a verdict.

The note or memorandum in writing of the bargain in the case of a sale of goods for the price of 10*l.* or upwards, required by the statute 29 *Car. 2. c. 3. s. 17.*, must state the price for which the goods were sold.

Scarlett now moved accordingly, and contended, that as the defendant's letter was an acknowledgment by him that he had bought the horse on the 13th of *June*, it was a note in writing of a bargain for the purchase of a

P p 4

horse,

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horse, and that it was competent to the plaintiff to prove the value of the horse by parol evidence, and to recover the amount under the count for quantum valebant. But

Per Curiam. There must be a note or memorandum in writing of the bargain. The price agreed to be paid constitutes a material part of the bargain. If it were competent to a party to prove, by parol evidence, the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent.

Rule refused.

Wednesday,
May 31st.

DOE dem. EVANS against EVANS.

Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold: Held, that at the expiration of the two years the copyholder might maintain an ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency, and the estate would not vest in the lord without any act done by him.

EJECTMENT for copyhold lands in *Somersetshire*.

Plea, the general issue. At the trial before *Gaselee J.*, at the *Somerset* Summer assizes, 1825, it appeared that the lands in question were holden of the manor of the vicarage of *Chew Magna* and *Dundry*, in the county of *Somerset*, by copy of court-roll, bearing date 26th November, 1783, by which it appeared that one *F. King* and *J. Evans*, the father of the lessor of the plaintiff, surrendered their lands, and took a new grant to *F. King* for life, and after his decease to *J. Evans* for life; and after his decease, to his wife, *Jane Evans*, *J. Evans* their son, (the lessor of the plaintiff,) and *T. Evans* their son, (the defendant,) as joint tenants, for the term of their lives, and the life of the longest liver. *F. King* died in 1807, and *J. Evans*, the father, in 1818; *Jane Evans* was still alive. In 1808 the lessor of the plaintiff was convicted of

of larceny, and sentenced to seven years' transportation. In 1814 he was capitally convicted of being at large in this country before the period of his transportation had expired, and was thereupon attainted, but he received a pardon under the sign-manual, on condition of being imprisoned for two years, which time expired before the day of the demise. Ouster was admitted. For the defendant it was objected, that by the attainder the lessor of the plaintiff was under a civil incapacity to make a demise. The learned Judge reserved the point, and the plaintiff had a verdict, subject to a motion to enter a nonsuit. A rule for that purpose having been obtained,

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Merewether and *Erskine* now shewed cause. The question in this case turns upon the capital conviction in 1814. The forfeiture of a copyhold estate is to the lord, and not to the king; 1 *Wat. Copy. tit. Forfeiture*, 341., *Kean v. Kerby* (a), *Margaret Podger's case* (b). Now the forfeiture was from the time when the offence was committed; *Co. Lit.* 390 b., *Com. Dig. Forfeiture* (B 6.); from that time, therefore, the joint-tenancy was severed. The attainder did not follow until some time after, so that the defendant could have no claim by survivorship, the joint-tenancy having been severed before the civil death of the felon. The joint-tenancy having been severed, the lord might have entered and seized; but as he did not, the lessor might still hold the estate; *Rex v. Haddenham* (c). The case of *Benson v. Strode* (d) may be relied on for the defendant; but there, by the form of the grant, the right of the remainder-man ac-

(a) 1 *Mod.* 300.(b) 9 *Co.* 107.(c) 15 *East*, 463.(d) *T. Jones*, 190. 3 *Lev.* 94. *S. C.* by the name of *Strode v. Dennison*.

crued

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crued on the forfeiture. Then as to the disability of the lessor, there can be no doubt that it was removed by the pardon. The statute 6 G. 4. c. 25. s. 1. enacted, "That in all cases in which His late Majesty, or the King's Majesty that now is, his heirs or successors, hath been or shall be pleased to extend his or their royal mercy to any offender convicted of any felony, whereby the offender was, is, or shall be excluded from the benefit of clergy, and by warrant under his or their sign-manual, countersigned by one of his or their principal secretaries of state, hath granted or shall grant to such offender either a free pardon, or a pardon upon condition of transportation, imprisonment, or any other punishment, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition, in case of conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony whereof he or she was so convicted." Here the lessor of the plaintiff was discharged out of custody in 1816, the condition of his pardon having then been performed; the pardon, therefore, operated from that time.

W. E. Taunton contra. It is not necessary for the defendant to contend that the lessor's interest in the estate survived to him. It is sufficient if the lessor is under a civil incapacity to make a lease. The case of *Rex v. Haddenham* was very different. That was a settlement-case; the lord had granted to the pauper after the attainder and pardon; and the Court held that he was estopped by the grant. In *Co. Lit. 2 b.* it is said, that an attainted felon cannot hold lands; if so, he cannot demise. The provision of the 6 G. 4. c. 25. s. 1. is certainly

tainly very extensive, but it could not in this case restore the capacity of the lessor; for upon the attainder the interest which was before in him vested in the lord, and the pardon could not divest that, and revest it in the felon; *Com. Dig. Pardon* (F). That was adjudged, amongst other things, in *Benson v. Strode*. (a) [Abbott C. J. It does not appear that the lord had entered in this case.] In *Benson v. Strode* it was held, that entry was not necessary to vest the estate. [Abbott C. J. The remainder-man had been already virtually admitted.] [Bayley J. In the report of that case, in *Skin.* 29. the Court say, that he in remainder shall enter.] That only means that he shall have the land. (b)

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ABBOTT C. J. There is no doubt that the pardon by virtue of the 6 G. 4. c. 25. restored the felon to his competency to hold lands; but it has been properly urged that it could not divest an interest which had previously been vested in another. That introduces another question, whether after the forfeiture it was necessary that any thing should be done by the lord to vest the estate in him. As at present advised, we think that some step by the lord was necessary; but if upon further consideration we alter our opinion, we will mention the case again.

Rule discharged nisi. (c)

The case was never mentioned again.

(a) *Sir T. Jones*, 190. 2 *Show.* 150.

(b) See the report of a former argument of the case in *Skin.* 8.

(c) A provision in an act of attainder, that the person attainted shall forfeit his lands does not vest in the king any freehold in deed or in law, but only vests a right or title in the king as an attainder of treason at common

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common law does. It does not vest the possession in the king, nor give him entry without office found. Till it appears of record what land a person attainted had, the common law will never adjudge the freehold in deed or in law of any land to be in the king till office found. Had the forfeiture only vested the possession in the king, the 33 H. 8. c. 20. in case of treason would have been in vain. Till office found, the freehold and fee-simple are in the person attainted so long as he lives; for, as he has capacity to take land by a new purchase, he has power to retain his ancient possessions, and shall be tenant to every præcipe. But when the person attainted dies, the land cannot descend to his heirs because of the corruption of blood, nor will it be in the king because no office is found; but if it be held of a common person, it shall escheat to him (a), and he shall be tenant in law to every præcipe until office is found for the king. If it be held of the king, the freehold shall be in the king in the nature of a common escheat until office found. If tenant in fee lease for life, with condition that the lessee shall have the fee if the lessor die without issue, and then the lessor is attainted (in a case to which 33 H. 8. c. 20. does not apply), and dies without issue, the lessee shall have the fee; at least if the attainder is by act of parliament, and the act saves the right and interest of all persons not included in the attainder. Lord *Lovel* was seised in fee, and leased to *Wright* for life; and if he, Lord *Lovel*, should die without issue of his body, then *Wright* should hold in fee. Lord *Lovel* was afterwards, 1 H. 7., attainted of treason by act of parliament, and it was enacted that he should forfeit all his lands. In trespass, plaintiff claimed under the attainder, defendant under the lease to *Wright*: the statute had a saving to all persons other than such as were thereby attainted, and their heirs, of such right, title, action, or interest in the premises as they ought to have had had that act not been made. Lord *Lovel* died, and on demurrer the question was, whether Lord *Lovel*'s attainder gave title preferable to *Wright*'s, and it was adjudged it did not, for the attainder, until office, did not divest Lord *Lovel*'s estate; and if *Wright*'s interest should otherwise have been destroyed, the saving preserved it. *Nichols v. Nichols.* (b)

(a) This is denied to be law in *Doutie's case*, 3 Co. 10 b.

(b) *Plowd.* 486.

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BURNETT and Others, Executors of the last Will and Testament of Sir ROBERT BURNETT, deceased, *against* W. D. LYNCH.

DECLARATION stated that the plaintiffs, as executors, before the making of the assignment, and also before the committing of the grievances thereafter mentioned; to wit, on, &c. at, &c. were lawfully possessed for the residue of a certain term, whereof at the time of making such assignment seven years were unexpired, of and in certain premises with the appurtenances, together with the use of certain household goods, furniture, fixtures, and other things mentioned in a schedule or inventory annexed to an indenture of demise or lease thereof made to Sir *Robert Burnett*, by *O. P. Meyrick*, Esq., bearing date the 30th of *August* 1804, under and subject to certain rents and certain covenants therein contained by Sir *R. Burnett*, his executors, administrators, and assigns, to be performed. The following covenants were then set out: "To paint the outside wood-work of the house, and the iron railing, &c. once in every five years, to repair during the term, and to yield up the premises sufficiently repaired at the expiration of the term, and to keep in proper order and condition the

In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it: Held, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease.

The lessee, by deed-poll, assigned his interest in the demised premises to *A.*, subject to the payment of the rent and the performance of the covenants contained in the

lease. *A.* took possession, and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that *A.* continued assignee of the premises, and recovered damages against the lessee: Held, that the lessee might maintain an action upon the case founded in tort against *A.* for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. It was averred in the declaration that the defendant continued in possession until the end of the term, and whilst he was in possession as such assignee, suffered the premises to be out of repair. The proof was that he had ceased to be assignee before the expiration of the term: Held, that this was not any variance.

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garden and gravel walks, preserve the fruit trees therein, and to replace such shrubs and fruit trees as might die or decay with others of an equally good or better sort; and at the end of the said term leave the garden walls properly planted with fruit trees, and the kitchen-garden ground properly planted with vegetables and roots." Averment, that defendant had notice of all these premises. And the plaintiffs being so possessed of the demised premises, afterwards, and before the committing of the grievances by the defendant as thereafter mentioned, to wit, on the day and year last aforesaid, at, &c. at the request of the defendant all the estate and interest of the plaintiffs of and in the demised premises, with the appurtenances, was duly assigned to the defendant, to hold to the defendant, his executors, &c. from the 29th September 1817, for the residue of the term by the indenture demised as aforesaid, *under and subject to the payment of the rents thereby reserved, and to the performance of the covenants therein contained, on the part and behalf of the said Sir Robert Burnett, since deceased, his executors, administrators, and assigns, from the said 29th day of September 1817, to be performed and kept.* By virtue of which assignment the defendant entered into and upon the said demised premises, and was possessed thereof for the residue of the term so to the said Sir Robert Burnett demised, and continued so possessed thenceforth for a long space of time, to wit, *unto the end and expiration of the term so demised as aforesaid, to wit, at, &c.*; whereupon it then and there became and was the duty of the defendant, as such assignee of the demised premises from the 29th September 1817, to perform all and singular the rents and covenants in the said indenture

indenture contained for and during so much of the residue of the term as he, the defendant, should remain possessed of the demised premises as such assignee as aforesaid. Nevertheless, the plaintiffs say that the defendant, not regarding his said duty in that behalf, but contriving, &c. to injure the plaintiffs in this behalf, did not, nor would, after he became possessed of the said demised premises, and after the said 29th day of *September* 1817, during the time he remained and continued possessed of the said demised premises, as such assignee thereof, at his own cost and charges, in a good and effectual manner, once in every five years of the said residue of the said term, paint all the wood-work of the outside of the said mansion-house and offices, &c. Breaches of the covenants to repair were then alleged to have been committed by the defendant, by suffering the premises to be out of repair whilst he was assignee, and so to continue for a long space of time, to wit, until and at the end and determination of the demised term. The declaration then proceeded as follows: By reason whereof, and of the said several breaches of covenant, the said *O. P. Meyrick* in *Hilary* term, in the fifth year of the reign of our lord the now king, in the Court of King's Bench, at, &c. impleaded the plaintiffs as such executors in a plea of breach of covenant for the damages sustained on occasion of such several breaches of covenant as aforesaid; and such proceedings were thereupon afterwards had in the said action, that in *Easter* term, in the sixth year of the reign of our lord the now king, it was by the said Court considered that the said *O. P. Meyrick* should recover, and the said *O. P. Meyrick* recovered against the plaintiffs as such executors 1165*l.* for his damages, as well
by

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by reason of the said several breaches of covenant as for his costs and charges about his suit in that behalf expended. By means of all which said several premises the plaintiffs as such executors were forced and obliged to pay, and afterwards, to wit, on, &c. at, &c. did actually pay the said sum of 1165*l.* so recovered against them as such executors, and were necessarily put to and incurred certain costs and charges amounting to 500*l.* in and about their defence in the said action, to wit, at, &c. To plaintiffs damage as such executors as aforesaid of 2000*l.* Plea, the general issue.

At the trial before *Best C. J.*, at the Summer assizes for the county of *Surrey*, 1825, the plaintiffs proved that the original lease, which had been granted by *Meyrick* to Sir *R. Burnett*, had been delivered to the defendant *Lynch*, and they proved the execution of the counterpart by the testimony of the subscribing witness. The defendant's counsel then put in the lease itself, which was produced by the solicitor of one *Daniel*, to whom the defendant had, as was proved, assigned the term by a deed reciting the lease; and it was then insisted, on the authority of the case of *Gordon v. Secretan (a)*, that it was incumbent on the plaintiff to prove the execution of it by calling the subscribing witness; but *Best C. J.* was of opinion, that as the lease was produced on the part of the defendant, who had taken a beneficial interest under it by accepting the assignment, proof of the execution of it by the subscribing witness was unnecessary. It was then proved that the plaintiffs, as executors of the lessee, had by deed poll, on the 5th of *September* 1817, assigned the lease to the defendant, subject to the payment of the rent, and

(a) 8 T. R. 548.

the performance of the covenants contained in the lease; that he (defendant) executed an assignment of his interest in the lease to *Daniel* on the 28th September 1824, two days before the term expired; that the latter had, in fact, taken possession of the premises in 1819, and occupied them till the expiration of the term. It was then objected that the plaintiffs had failed in proving the allegation in the declaration, viz. that *the defendant continued possessed of the demised premises until the end and expiration of the term*; and it was insisted, that in this form of action, which was founded upon a breach of duty, that allegation was material; for as the breach of duty alleged was, that whilst the defendant continued possessed as assignee, he suffered the premises to be out of repair, and to continue so until the end of the term, it would be an answer to the action to shew, that the premises were well and sufficiently repaired at the expiration of the term, although that would be no answer to an action of covenant where the assignee might be liable for breaches committed on each successive day of the term. *Best C.J.* was of opinion, that as the defendant had accepted the assignment, subject to the performance of the covenants contained in the lease, he was liable in damages to the plaintiffs for all those breaches of duty (which, in the lessee, would have been breaches of the covenants in the lease,) committed during the time he, the defendant, continued assignee of the term. In order to maintain the action it was necessary for the plaintiffs to aver in the declaration, and to prove at the trial, that the defendant was assignee during the time when some breach of duty was committed: the allegation was material so far as it imported that the defendant was assignee;

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and it was sufficient for the plaintiffs to prove in support of it, that any breach of duty was committed during the time he continued assignee: the allegation might be material with reference to the quantum of damages, for the plaintiffs would not be entitled to recover damages from the defendant for any breach of duty committed after the period at which he ceased to be assignee. A verdict having been found for the plaintiffs for 1850*l.*, *Taddy Serjt.*, in last *Michaelmas* term, moved for a new trial, and in arrest of judgment. The grounds upon which he applied for the new trial were, first, that there was a variance between the allegation in the declaration, and the proof; and, secondly, that the lease had not been duly proved. The grounds alleged for arresting the judgment were, that, as between the lessee and the assignee, the law did not by implication raise any duty in the latter to perform the covenants in the lease, but that it required an express contract to render an assignee liable to the lessee for breaches of those covenants; and he contended, first, that no action at all was maintainable by the lessee against the assignee, there being no contract between them that the latter should indemnify the former against any breaches of covenant; and, secondly, assuming that from the fact of the defendant's having accepted the premises assigned, subject to the payment of the rent and the performance of the covenants, the law would imply a covenant or promise to indemnify, then, either covenant or assumpsit was the proper form of action. The Court were of opinion that the allegation in the declaration was sufficiently proved. But on the other two points they granted a rule nisi for a new trial, or for arresting the judgment.

Marryat,

Marryat, Barnwell, and Starr shewed cause. The lease was sufficiently proved. First, proof of the counterpart by the subscribing witness is evidence of the original lease, where it appears that it has been assigned to the defendant. (a) Secondly, it was not necessary to prove the execution of it by the subscribing witness, because it was produced by one to whom the defendant, who had taken a beneficial interest under it, had delivered it. This case is not distinguishable in principle from *Pearce v. Hooper* (b) and *Orr v. Morrice*. (c) And here the delivery of the lease to another person is an additional acknowledgment by the defendant of its validity. Besides, in this case the defendant has admitted the lease and the assignment indorsed upon it to be valid, by the recital of them in his deed of assignment to *Daniel*; and that of itself is sufficient against him, *Ford v. Grey*. (d) There is not, then, any ground for a new trial, neither ought the judgment to be arrested, for the action is clearly maintainable. The defendant having accepted the assignment of the lease, subject to the performance of the covenants, there was a legal obligation upon him to perform those covenants; and he having wrongfully neglected to perform them, and thereby caused a damage to the plaintiffs, is answerable in an action on the case founded upon a breach of duty. For covenant does not lie upon an agreement without deed, but an action upon the case, *Fitz. N. B.* 145., *Com. Dig. Covenants* (A 1.) The assignment by the plaintiffs to the defendant is not the deed

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 Plaintiff
(a) *Per Tracy, Com. Dig. Testmoigne* (B 4.).(b) 3 *Traut.* 60.(c) 3 *B. & B.* 139.(d) 1 *Salk.* 285. *Com. Dig. Testmoigne* (B 5.).

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of the defendant, but a deed-poll, and therefore only the deed of the assignors, *Co. Lit.* 363 *b*. There are, indeed, some cases where a party not sealing has been held to be bound in covenant; but these are exceptions to the general rule, and differ in every respect (except the absence of sealing) from the present case. Thus in *Brett v. Cumberland (a)*, Queen *Elizabeth*, by letters patent, let to one *William Cumberland* a water-mill, &c., wherein were these words: "And the said *William* and his assigns shall repair, and leave in repair, the said water-mill," &c.: the question was, whether these words in the patent, to which the queen's seal only was affixed, should enure as a covenant to bind the lessee; and it was resolved that they should, "for the lessee takes thereby, because it is matter of record, although in show they are the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact; and shall bind him as strongly as if it had been a covenant by indenture." But this assignment is neither a record nor an indenture, nor does it contain words of express covenant. Also in the report of that case in 2 *Roll. Rep.* p. 63., a case is cited from the 38 *Ed. 3.* 8. (b), three persons were enfeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and only two sealed the deed, yet inasmuch as the third *entered* and *agreed* to the estate conveyed by the deed, he was held to be bound in a writ of covenant by the sealing of his companions. There it was the intent of the parties that all the three feoffees should execute the deed, and the third did agree to

(a) *Cro. Jac.* 521.

(b) According to the report in the Year-book this was an action of debt.

it, and entered, and this was considered tantamount to his executing it. In the present deed-poll of assignment it was never intended that the defendant should execute it: there is no express covenant on the part of the defendant, and no companion by whose sealing he can be bound. But, if covenant would lie, it does not follow that case will not also lie; for in *Kinlyside v. Thornton* (a) it was held that case, in nature of waste, would lie against the tenant for years after the expiration of his term as well as covenant. This action is not an action on the case in the nature of waste. In order to maintain that action, it is necessary for the plaintiff to have a reversionary estate: an assignor has no reversion. But this is an action on the case founded upon the relation constituted by this deed-poll of assignment between the plaintiffs and the defendant: the latter stands, with respect to the former, in the situation in which they originally stood to the lessor, who having, under the express covenants in the lease, recovered damages against the plaintiffs, it is fit that those damages should be reimbursed to the plaintiffs by the defendant who took the premises from them, the breaches of covenant having been committed during the time he continued assignee. It has been said that in equity an assignee is in such a case as the present liable to the lessee, and that he cannot, having taken the premises subject to the performance of the covenants, insist that the lessee, as assignor, should, in his place, be subject to perform the covenants, *Staines v. Morris*. (b) The language of this declaration is that which is adopted by the common law when it seeks to raise an equitable liability into a legal duty. The defendant accepted the assignment subject

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(a) 2 W. Bl. 1111.

(b) 1 Ves. & Beamers, 8.

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to the performance of the covenants in the lease: it became his duty to perform them, and he has been guilty of a breach of that duty, by reason of which the plaintiffs have been damnified. There is a wrongful act done by the defendant, and a consequential damage to the plaintiffs, and, consequently, an action on the case founded upon that wrongful act is maintainable. It may be true that assumpsit is, also, maintainable; but that is because the law implies a promise to do that which a party is legally liable to perform. It was competent to the plaintiffs in this case to declare either in tort or assumpsit, and to describe their cause of action, either as founded on a breach of duty, or on a breach of promise implied by law from that duty.

Taddy Serjt. and Platt contra. The general rule is, that it is incumbent on a party to prove the execution of a deed by the testimony of the subscribing witness. The exception to that rule is, that where an instrument comes out of the possession of an adverse party, who, at the time when he produces it, is possessed of a beneficial interest under it, proof of the execution of it is unnecessary. This is not a case within the exception, because the defendant was possessed of no beneficial interest under the lease, either at the time of the trial or at the determination of the term when the plaintiffs' cause of action accrued. Then as to the right of the plaintiffs to maintain this action, the law does not imply any duty in the assignee of a lease towards the assignor to perform the covenants in the lease. The assignee is liable to the lessor for any breach of covenant by reason of privity of estate. But there is no privity of estate between a lessee and the assignee, for the former by assignment

signment parts with his whole interest. The assignee cannot become bound to the lessee to perform the covenants without an express contract. That has been the understanding in the profession; for it has been the general practice for the assignor of a lease to take a bond or deed of indemnity from the assignee. But assuming that some action is maintainable, an action upon the case founded upon a breach of duty is not the proper form of action, but either covenant, which is founded upon a contract under seal, or assumpsit, which is an action on the case founded upon a promise not under seal. The lease was assigned to the defendant subject to the performance of the covenants, and he took possession of the premises demised by the lease under that assignment. The law may thence imply a covenant or promise on his part to perform the covenants, and the assignment in this instance being by deed, the law will imply a covenant on the part of the assignee. In 1 *Rolle's Abr.* 516. *Cov. (B)*, pl. 1., it is laid down, that covenant lies for breaking a covenant by the lessee in the king's patent, though the lessee did not seal any counterpart, for his acceptance charges him; and in *Co. Litt.* 231 a., if a lease be to *A.* and *B.* by indenture, and *A.* seal a counterpart, and *B.* agrees to the lease but does not seal, yet *B.* may be sued for covenant broken. Here the assignee has agreed to the assignment, for he has taken possession of the premises intended to be conveyed to him. He is therefore liable in covenant, although he did not seal the deed. *Kinlyside v. Thornton* (a) is relied upon as an authority to shew that case will lie as well as covenant. There an

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action on the case in the nature of waste was brought by the lessor against a tenant for years after the expiration of his term, for breaches of covenants contained in the lease. The foundation of that action was that the lessor was injured in his reversion, but here the plaintiffs, having assigned their whole interest, had no reversion. In *Jones v. Hill* (a) the lessee had covenanted to repair the premises during the term, and to yield up the same at the end of the term as well repaired, and in as good condition as the same should be when finished under the direction of *J. M.* It was held that an action on the case in the nature of waste could not be supported against the assignee of the lessee for suffering the premises to be out of repair during a part of the term, and after the expiration of the term wrongfully yielding them up in a much worse condition than when the same were finished under the direction of *J. M.* Thirdly, assuming that covenant will not lie against the assignee, because he has not bound himself by deed under seal to perform the covenants in the lease, still, if there be any remedy, the law may, from the fact of his having accepted the possession of the premises subject to the performance of the covenants, imply a promise on his part to perform those covenants; and then assumpsit, which is an action upon the case founded upon a promise, ought to have been the form of action adopted.

ABBOTT C. J. I am of opinion that this rule ought to be discharged. The ground of the application for a new trial was, that, although the lease made to the estator of the plaintiffs was produced, either by the de-

a) 7 Taunt. 391.

fendant or a person claiming under him, it could not be used in evidence by the plaintiffs, without calling the subscribing witness to prove the execution of that instrument. I am clearly of opinion that as against the present defendant it was unnecessary, both with reference to the subject-matter of the lease, and with reference to the parties. It was proved at the trial that the plaintiffs' testator had executed a lease, and that the plaintiffs, his executors, had assigned that lease to the defendant, and that the latter had executed a deed by which that lease was again assigned to one *Daniel*, which deed so executed by *Lynch* recited the lease which had been granted to the testator of the plaintiffs. That recital was, as against *Lynch*, abundant evidence of the existence of the original lease. Upon that short ground, I think the lease was sufficiently proved. Upon the other ground, also, I think, that the evidence was sufficient, because, although the defendant had quitted possession before the lease expired, still he had held under the very lease during part of the term.

Then as to the motion in arrest of judgment, the facts appear to stand thus: A lease had been granted to Sir *Robert Burnett*, whereby he had covenanted to pay rent and perform the other covenants contained in the lease. The plaintiffs (his executors) afterwards assigned that lease to *Lynch* the defendant, and by the terms of that assignment *Lynch* was to hold, subject not only to the payment of rent but to the performance of the covenants. It is true he entered into no express covenant or contract that he would pay the rent and perform the covenants. But he accepted the assignment subject to the performance of the covenants; and we are first to consider whether any action will lie against him. If we should

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should hold that no action will lie, this consequence will follow, that a man having taken an estate from another, subject to the payment of rent, and the performance of the covenants, and having thereby induced an understanding in that other, that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense shew that that never could be intended; and if the law of *England* allowed any such consequence to follow, in that case it would cease to be a rule of reason. Then, if some action will lie, the next question arises, What must be the form of the action? It has been contended that if any action will lie, it must be an action of covenant. I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person who, by himself, or some other person acting on his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as those mentioned in *Co. Litt.* 231 a.) has agreed by deed to do a certain thing. Here the defendant has not engaged by deed to perform the covenants, and, consequently, covenant will not lie. Then will an action of *assumpsit* lie? I think it would; but why? Because the defendant has, by taking the estate subject to the payment of rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants; and if by neglecting that duty a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty, and in that case the action of *assumpsit* will lie. [But it by no means follows, that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach

breach of that duty from which the law implies a promise, may not also be maintainable.] *Kinlyside v. Thornton* is an authority from which it may be inferred that either assumpsit or case will lie. The only case which militates against the plaintiffs is that of *Jones v. Hill* (a), the facts of which were very similar to the present. But I think the attention of the Court was not called to the true ground on which the plaintiffs' case was founded. It was contended for the plaintiffs that an action on the case was not maintainable for permissive waste. The Court did not decide that point, but merely that it was impossible it should be waste to omit to put the premises into such repair as A. B. had put them into. *Kinlyside v. Thornton* was there cited; but it was not argued that by the acceptance of the assignment it became the duty of the assignee to do the very thing, the omission to do which was made the subject of complaint. The case was not put on the ground that a duty had arisen. Here that ground has been taken; and I think that a duty did arise when the defendant accepted the assignment of the lease, subject to the performance of the covenants, and that as a breach of that duty has been committed, a special action on the case may be maintained. The rule for a new trial, and for arresting the judgment, must, therefore, be discharged.

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BAYLEY J. I agree with my Lord Chief Justice upon both points. My opinion upon the first point is founded upon this, that the deed came out of the possession of a party who must be considered as identified

(a) 7 *Thom. 392*.

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with the defendant, and that it was a deed under which the defendant and the party claiming under him had taken all the interest which they professed to take. A distinction has been taken between this and the other cases cited in argument, on the ground that the defendant at the time when the deed was produced in this case had no longer any existing interest under the deed: I think that is immaterial. My opinion is, that it is not competent to a party, who has taken under a deed all the interest which that deed was calculated to give, to dispute its due execution.

Upon the other point it is not necessary to decide whether assumpsit or covenant will lie; but I have no difficulty in saying, that an action upon the case founded upon the tort will lie, on this ground, that from the facts stated in this declaration the law raises a duty in the defendant to perform the covenants, that there has been a breach of that duty, and that damage has accrued to the plaintiffs in consequence of that breach of duty. In this case the defendant took the lease as the assignee of the plaintiffs, subject to the payment of the rent and the performance of the covenants. Sir *R. Burnett* (or his representative), in the character of lessee, was liable by express covenant to the lessor for the performance of the covenants in the lease. The latter had a right from time to time to claim from Sir *Robert Burnett* the rent and a compensation for the non-performance of the covenants. As soon as the lessee assigned, the lessor then had his option to claim his rent or a compensation for the non-performance of the covenants either from the lessee or his assignee. The lessee could not be hurt if it was claimed of him, if he in that case had his remedy over against the assignee, and the assignee could not be hurt
because

because he had taken the property subject to the payment of rent and the performance of the covenants. And if he has been guilty of negligence with reference to those conditions, and the plaintiffs have been damaged by that negligence, they have thereby acquired a right of action. There is a duty from the defendant to the plaintiffs implied from the very nature and state of things which existed between the parties. That duty appears to me to be very accurately stated in the declaration, where it is described as commensurate with the time during which the assignee had an interest in the premises. It is unnecessary to go through the cases in which it has been decided, that although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty. In *Dickson v. Clifton (a)*, the plaintiff, an owner of a ship, declared that he had retained and employed the defendant in his service to be master and commander of the vessel, and to receive on board at *Brough*, in the county of *York*, fifty-six quarters of malt, and to carry and convey the same by water from thence to a place called *H.* in *Yorkshire*, and at *H.* to deliver the same to *A. B.* Now there can be no doubt that an action of assumpsit might have been maintained against the captain for not receiving and carrying the corn, or for not taking care of the cargo; but there the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty. That could only be because the express contract between the parties created a duty, for

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(a) 2 Wils. 519.

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the breach of which an action of tort might be maintained. The decision in *Bretherton v. Wood* (a), and other cases, are all founded upon the same ground. This is not an action upon the case in the nature of waste, but an action brought by a party to recover compensation in damages because the defendant has not performed that duty which between him and the plaintiff he was bound to perform. They were in the relative situation of lessee and assignee; and the assignee having accepted the premises subject to the performance of the covenants, there was a duty imposed upon him by law to perform those covenants: there was a neglect of that duty, and a damage accruing therefrom to the plaintiff. To recover a compensation for that damage, I think the action was maintainable.

HOLROYD J. I think that the lease was properly received in evidence without proof of execution by the subscribing witness, inasmuch as it came out of the hands of the defendant or of a person who claimed under the defendant, and had enjoyed the premises under it. Coming from such parties, I think it might be taken as evidence without any other proof. The other question lies in a very narrow compass. The plaintiffs, as the representatives of the testator, were subject to the payment of rent and the performance of the covenants contained in the lease. The declaration alleges that the defendant knew of these circumstances. The plaintiffs assigned the lease to the defendant, subject to the payment of the rent and the performance of the covenants, and the defendant entered into possession. The consequence was, that he thereby

(a) 3 B. & B. 54.

took away the tenancy from the original lessee, and it became vested in him as assignee. He had the benefit of the estate, and then upon the maxim, *qui commodum sentis onus et sentire debet*, he is liable. Unless there had been an express covenant, the lessor could not sue the original lessee for a breach of the covenants committed after he had assigned. Then what is the effect of the assignment? The assignee by virtue of it stands in the situation of the lessee, and becomes bound to pay the rent and to perform the covenants. By accepting the assignment, he states that he is subject to the rent and the performance of the covenants. I think, therefore, that he is bound to perform them not merely by a moral obligation, but by a legal obligation, created by the common law, from the facts stated in the declaration. The assignee standing in the situation of the original lessee is liable by the common law to all the duties which were cast upon the lessee by means of his covenants in the lease. And if that be so, the consequence seems to follow that an action on the case will lie against the assignee when he neglects to discharge those duties. I think that is the proper remedy. I have considerable doubt whether covenant would lie; but even if it would, that would not take away from the plaintiffs the right to maintain an action upon the case. If neither case nor covenant is maintainable, the consequence would be that the plaintiffs who have been sued, and who have paid large damages for breaches of covenant committed after they assigned, would have no remedy. And the defendant, although he had the benefit of the estate, would not be bound either to pay rent or perform the covenants. It would be pregnant with great injustice if we were compelled so to decide. I think, however, that we are justified,

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tified by the principles of the common law in holding that the defendant is liable in this form of action.

LITLEDALE J. I think sufficient evidence was given of the execution of the lease, for the reasons already stated by the Court. The next question is, whether an action be maintainable at all; and if it be, then whether, in point of form, it should have been case or covenant. Upon the question, whether any action be maintainable, under the circumstances stated in the declaration, by the original lessee against the assignee, I own, for some time I had considerable doubt. There is no instance of any such action in any of the books. On the first view of it, there does not appear to be between the lessee who assigns his whole interest, and the assignee, that privity which is necessary to maintain any action whatever. The practice in the profession has been for the lessee to take from the assignee a bond or a covenant to indemnify, and not merely to assign by a deed-poll. But at the same time, it appears to me that, on principle, an action on the case may be maintained by an original lessee against his assignee. If an action were not maintainable where no bond or covenant has been taken, the consequence would be, that if the original lessor chose to sue the lessee, and not the assignee, the lessee would be left without any remedy whatever, and would have to pay the rent during the whole term, and be answerable for breaches of covenant, although the assignee occupied, and committed those breaches. There does, therefore, appear to be very good reason why such an action should be maintainable. Then it is said, if any action will lie, it must be an action of covenant; but it appears that in this case the assignment has been

been made by deed poll executed by the assignor, and not by the assignee. I therefore think that covenant will not lie. An action of covenant will lie by the lessee against the lessor upon the word "*demise*" in the lease; but that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term, and therefore if the lessee be ousted during the term, an action of covenant will lie by him against the lessor; but the word *assign* in this deed poll does not import any covenant or contract on the part of the assignee, but is a mere description of the interest conveyed. It is true that the lessee does not assign the term generally, but that he assigns it subject to the payment of the rent and the performance of the covenants. The assignment being by deed poll does not however contain any contract on the part of the assignee, and in order to enable the assignor to maintain covenant against the assignee, there must be a contract under seal by the latter. But it is said that the plaintiff ought to have brought *assumpsit*, that being the form of action best adapted to his case. *Assumpsit* lies where a party claims damages in consequence of a breach of promise not under seal. That promise may either be express or it may be implied from a legal obligation to do a particular act. Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action. But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the

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more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action; and that form of action in which the real cause of action is most accurately described, is the best adapted to every case. If the plaintiffs in this case cannot say that the defendant undertook to pay the rent and to perform the covenants, and has not done so, assumpsit is not the form of action the best adapted to his cause of complaint. If a regular contract to indemnify had been executed, or there had been any express promise by the assignee to pay the rent and perform the covenants, and a breach of that promise, then an action of assumpsit, founded upon that breach of promise, would lie by the lessee by reason of the damage thereby sustained, and would be the more proper form of action. The very ground of the action would be that the plaintiffs were damnified by reason of their having to perform that which the assignee ought to have performed. But in that case the action would be founded upon the promise to indemnify. Here there having been neither an express contract to indemnify, nor any express promise to perform the covenants, I think an action on the case, founded upon a breach of duty, is more proper than an action of assumpsit founded upon the breach of a supposed promise. The ground of the present action is the damage resulting to the plaintiffs from a default of duty by the defendant. The duty was not to be performed to the plaintiffs, but to the original landlord in respect of the land. But the interest which the defendant had was derived from the plaintiffs, and it is in consequence of the neglect of duty by the defendant that the plaintiffs have

have been damnified, the original landlord having recovered against them damages by reason of breaches of covenant contained in the lease, committed after they assigned to the defendant. A breach of duty in the defendant, and a damage resulting therefrom to the plaintiffs, is a proper subject for an action on the case in tort. For these reasons I agree that the rule for a new trial, or for arresting the judgment, must be discharged.

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Rule discharged.

JOHN FROST, Clerk to the Commissioners under the Local Paving Act, 12 G. 3. c. 69., against JAMES BOLLAND and Others, Assignees of MARSH, STRACEY, FAUNTLEROY, and GRAHAM, Bankrupts. *Friday, June 2d.*

DEBT by the plaintiff, as clerk to the commissioners appointed to carry into execution the local paving act 12 G. 3. c. 69. against the defendants, who are assignees of *Marsh, Stracey, Fauntleroy, and Graham*, bankrupts under separate commissions, to recover the

Where, by statute, it was enacted, "that in case any treasurer, collector, officer, or other person appointed by the commissioners having

the controul of the pavements of any places mentioned in the act, for the collection and receipt of monies to be collected and received by virtue of any rates and assessments, &c., shall happen to become bankrupt before he shall have fully paid and satisfied all monies received by him or them, for or in respect of any such rates or assessments, or for or on account of the commissioners, &c., the assignees shall pay in full all the money due to such commissioners, (if the bankrupt's estate be sufficient,) in preference to all debts, except those due to the king: Held, that bankers employed by the commissioners, without any actual appointment, were within the words "other persons" used in this section, as being in the nature of treasurers, and that inasmuch as the statute did not require the appointment of treasurers, collectors, &c. to be in writing, the employment was equivalent to an appointment.

The same statute enacted, that the commissioners might sue in the name of their clerk for the recovery of any penalty or rate, or any other sum or sums of money at any time due and payable from or by any water or gas company, or commissioners of sewers, or any other person or persons, due or payable by virtue of any local act or that act: Held, that the commissioners might sue in the name of their clerk to recover from the assignees of their banker the balance in his hands at the time when he became bankrupt.

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sum of 1070*l.* 12*s.* due, as received by the bankrupts to the use of the commissioners, and which the defendants, it was insisted, were liable, as such assignees, to pay under provisions in the general metropolis paving act 57 G. 3. c. 29. s. 51., and which entitles commissioners for paving to a preference to other creditors. The declaration contained special counts, and also a general indebitatus count, founded on the 57 G. 3. c. 29. s. 120. The defendants pleaded the general issue *nil debent*, on which issue was joined. At the trial before Abbott C. J. at the *Westminster* sittings after last *Trinity* term, a verdict was found for the plaintiff for 1070*l.* 12*s.*, subject to the opinion of this Court upon the following case. The local and public act 12 G. 3. c. 69. appoints commissioners for paving or otherwise improving certain streets, and other public passages and places in the parish of *St. Pancras, Middlesex*. The 4th section enacts, "that it shall and may be lawful to and for the said commissioners (the previous section nominating the commissioners at the time of passing the act, and directing the appointment of commissioners in future), or any seven or more of them, at any meeting to be held in pursuance of that act, to appoint one or more treasurer or treasurers, clerk or clerks, collector or collectors, surveyor or surveyors, with such allowances as they shall judge reasonable, and may also from time to time appoint such other officer or officers as they shall find necessary and convenient, and shall or may take security from all such persons for the due execution of their respective offices, and may from time to time remove all or any of the said officer or officers, or other person or persons, and appoint others in the room of such of them as shall be so removed." The 76th section enacts,

"that

“ that the collector or collectors of the rates and assessments aforesaid shall pay the money as he or they shall receive the same, to the treasurer or treasurers for the time being to the said commissioners.” The 77th section enacts, “ that as soon as conveniently may be after the treasurer or treasurers of the said commissioners shall at any time have received the sum of 500*l.* of the monies appointed to be received by him or them, by virtue of and for the purposes of this act, he or they shall from time to time pay the same into the hands of such banker or bankers as the said commissioners, or any seven or more of them, shall for that purpose direct, in the name and on the account of the said commissioners ; and the same shall be disposed of by order of the said commissioners, or any seven or more of them, for the purposes of this act, and not otherwise.” The 79th section enacts, “ that four times at least in every year an account, from the book or books to be kept by the collector or collectors, of the sum or sums of money as shall be so assessed, shall be fairly stated and signed by the collector or collectors, and delivered by him or them to the said commissioners, who are hereby empowered to give a discharge to the said collector or collectors for all such monies as he or they shall have truly accounted for ; and in case any treasurer or treasurers, collector or collectors, officers *or other persons*, shall happen to die or become bankrupts, before he or they shall have fully paid and satisfied all the monies by him or them received by virtue of this act, then and in every such case the executors, administrators, or other legal representatives, person or persons possessing the estate and effects of every such treasurer or treasurers, collector or collectors, officer or officers, or other person or per-

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sons, or the assignees or assignees of such bankrupt, shall, out of such estate and effects, pay unto the treasurer or treasurers for the time then being to the said commissioners, all such sums of money as shall be in the hands of such persons respectively at the time of his or their death, or at the time of suing out any commission of bankrupt against him or them, and not paid over; or so much thereof as the said estate or effects will extend to pay, &c.; and in case of non-payment of the same by the space of ten days after the same shall have been demanded, it shall and may be lawful to and for the treasurer or treasurers for the time being to such commissioners, and he and they is and are hereby directed and required, in his or their own name or names, to commence one or more action or actions in any of his majesty's courts of record at Westminster, against such executors, administrators, assignee or assignees, or other persons as aforesaid, for the recovery of the same." The general metropolis paving act 57 G.3. c. 29. s. 47. enacts, "that the commissioners or trustees, or other persons having the controul of the pavements of any parochial or other district within the jurisdiction of this act, may at any meeting or meetings appoint a clerk or clerks, and may appoint one or more collector or collectors of the rates and assessments, and an inspector or inspectors of the pavements within their parochial or other districts, and such other officer or officers for the execution of this act or of the local act or acts of parliament relating to the paving of such parochial or other district exclusively, or jointly with any other matters or objects, as such commissioners, trustees, or other persons shall think proper; and may from time to time remove them, or any of them, and appoint other persons

sons in his or their stead as they shall think it necessary or convenient." The 51st section enacts, "that in case any treasurer, collector, officer, or other person appointed by the commissioners or trustees, or other persons having the controul of the pavements of the streets and public places in any parochial or other district within the jurisdiction of this act, for the collection and receipt of the monies to be collected and received by virtue of any rates and assessments which may be made for or towards the expences of paving and keeping in repair the pavements of any streets and public places within such parochial or other district, either exclusively or jointly with, or for, or towards any other objects or purposes, shall happen to die or become bankrupt before he or they shall have fully paid and satisfied all monies received by him or them for or in respect of any such rates or assessments, *or for or on account of the commissioners* or trustees, or other persons by whom he or they shall have been appointed; then and in every such case, if such treasurer, collector, officer, or other person shall die, the executors, administrators, representatives, or other persons possessing the estate and effects of every such treasurer, collector, officer, or other person appointed by the said commissioners or trustees, or other persons having the controul of the pavements of the streets and public places within such parochial or other district; or if he shall become bankrupt, then the assignee or assignees of the estate and effects of such bankrupt shall, out of such estate and effects, pay to the said commissioners or trustees, or other persons having the controul of the pavements of the streets and public places within such parochial or other district as aforesaid, or to such person or persons as they shall

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from time to time direct to receive the same, all such sum and sums of money as shall have been collected or received by such treasurer, collector, officer, or other person appointed by the said commissioners or trustees, or other persons as aforesaid; and which shall be due and owing from him to the said commissioners or trustees, or other persons as aforesaid, by whom he or they shall have been so appointed, at the time of his death, or at the time of the suing out any commission of bankruptcy against him, and not paid over, or so much thereof as the said estate and effects of such treasurer, collector, officer, or other persons appointed by the said commissioners or trustees, or other persons as aforesaid, who shall so die or become bankrupt, will extend to pay, and in preference to any other debt or debts except debts due to the king's majesty, &c. And in case of non-payment of all and every such sum or sums of money by any executor, administrator, assignee, or other person as aforesaid, for the space of ten days after the same shall have been demanded by or on the behalf of the said commissioners or trustees, or other persons by whom such treasurer, collector, officer, or other person dying or becoming bankrupt had been appointed, it shall and may be lawful to and for the said commissioners or trustees, or other persons having the controul of the pavements within such parochial or other district, by whom any such treasurer, collector, officer, or other person had been appointed, to commence one or more action or actions in any of his majesty's courts of record at *Westminster* against such executor or administrator, assignee, or other person as aforesaid, for the recovery of the same sum or sums of money." The 120th section enacts, "that the said com-

commissioners or trustees, or other persons having the controul of the pavements in any streets or public places, in any parochial or other district within the jurisdiction of this act, may sue and be sued in the name of their respective clerks for the time being; and that all actions or suits that the said commissioners or trustees, or other persons having the controul of the pavements in any streets or public places, in any such parochial or other district, may at any time or times hereafter direct to be brought for the recovery of any penalty or rates, *or any other sum or sums of money* from time to time or at any time due or payable, from or by any water or gas companies or commissioners of sewers, *or any other person or persons*, due or payable by virtue of any local act or acts of parliament relating to their respective parochial or other district, or of this act, or for or in respect of any other matter or thing relating to such local act or acts of parliament, or to this act; may be brought in the name of such clerk or clerks respectively for the time being in any of his majesty's courts of record at *Westminster* by action of debt," &c. The 138th section enacts, "that neither any act or acts of parliament relating either exclusively to the paving or repairing the pavement of the streets or public places in any parochial or other districts within the jurisdiction of this act, or relating thereto jointly with any other object or purpose, nor any clause, matter, or provision therein contained shall be hereby repealed."

On the 1st of *July* 1819, the office of treasurer to the said commissioners became vacant by the death of *John Jones*, Esq., after whose death no treasurer was appointed by the said commissioners, and on *July* 8th, 1819, Messrs. *Marsh, Sibbald, Stracey, Fauntleroy*, and *Graham*, (the persons then composing the firm of *Marsh* and

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and Co.) were appointed bankers to the said commissioners, by an appointment which was and is as follows: "Resolved, that Messrs. *Marsh, Sibbald, Stracey, Fauntleroy, and Graham*, of No. 6. *Berners Street*, be appointed bankers to this commission, and that the collector do weekly pay into their hands on the account of this board all monies accruing to the commissioners." signed, "*John Frost*, clerk to the commissioners." This entry appears in the book of the proceedings of the commissioners, and the appointment was made at a meeting at which fourteen commissioners were present. In or about *September 1819*, *Sir James Sibbald*, a partner in the said firm, died, and after his death the business was continued by the other partners. The said commissioners under the said local paving act, and as such commissioners, after the death of *Sir James Sibbald*, continued to employ the said Messrs. *Marsh, Stracey, Fauntleroy, and Graham*, but without any new appointment, as the bankers of the said commissioners, and in the course of such employment the said Messrs. *Marsh, Stracey, Fauntleroy, and Graham* before the 16th of *September 1824*, received monies of and belonging to the said commissioners amounting to the sum of 1070*l.* 12*s.* for the use of the said commissioners, being monies collected and received by the collectors of the said commissioners in virtue of the rates and assessments made under and by virtue of the said first-mentioned act. On the 16th of *September 1824*, the said Messrs. *Marsh, Stracey, and Graham*, being respectively traders, and subject to the bankrupt laws, and having committed acts of bankruptcy, a valid commission of bankruptcy was issued against them on a sufficient petitioning creditor's debt, and they were duly declared bankrupts, and the said defendants were duly chosen and appointed and became their

their assignees as such bankrupts; and on the 29th of October 1824, a separate commission was issued against the said *Fauntleroy*, and he was duly declared a bankrupt, and the said defendants were duly appointed his assignees on the 7th day of November 1824. At the times when the said Messrs. *Marsh*, *Stracey*, and *Graham*, and the said *Henry Fauntleroy* respectively became bankrupts, they were indebted to the said commissioners in the said sum of 1070*l.* 12*s.* That the said defendants as such assignees of the said Messrs. *Marsh*, *Stracey*, *Fauntleroy*, and *Graham*, jointly as well as separately, have received and were possessed of from and out of the joint estate, and also out of the respective estates of the said Messrs. *Marsh*, *Stracey*, *Fauntleroy*, and *Graham*, more money than will be sufficient to pay and satisfy to the said commissioners and the said plaintiff the said sum of 1070*l.* 12*s.* On the 25th day of January 1825, the said commissioners by their then and present clerk, the said plaintiff, did duly in writing demand by and on the behalf of the said commissioners of and from the said defendants, so being such assignees as aforesaid, the payment of the said sum of 1070*l.* 12*s.*, and after ten days had expired from the time of such demand this action was commenced by the said plaintiff, who was then and still is the clerk of the said commissioners by them duly appointed, in his name by the express directions and authority of the said commissioners.

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Chitty for the plaintiff. Three objections were made at Nisi Prius to the recovery of the plaintiff. First, that he had no power to sue in this case. Secondly, that bankers are not within the 51st section of the

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12 G. 3. c. 69. Thirdly, that the bankrupts were never duly appointed bankers to the commissioners after Sir *J. Sibbald* died. As to the first, it is clear that the 120th section of the general act gives the commissioners power to sue in the name of the clerk for all debts due to them, and not merely for those which are particularly specified. Secondly, by the words "other persons," in the 79th section of the 12 G. 3. c. 69. the local paying act are sufficient to give the commissioners a prior claim in the event of the insolvency of a banker, having their monies in his hands, as well as in the case of the officers particularly enumerated, and the 51st section of the general act clearly gives such priority. Thirdly, the statute does not require an appointment of bankers to be in writing, and therefore the employment of *Marsh and Co.* after Sir *J. Sibbald* died, is sufficient to make the assignees liable.

Bolland contra. The 71st section of the 12 G. 3. c. 69. provides, that in case any treasurer, collector, officer, or other person shall die or become bankrupt, having the monies of the commissioners in his hands, they shall have a priority of claim. Now the words "other persons" must apply to persons *ejusdem generis* with those specified, and such a construction will not include bankers. Then, secondly, the latter part of the same section provides that the treasurer shall sue in his own name, and although the act does not say what shall be done if there be no treasurer, (which in this case appears to have been the fact,) still the commissioners might sue in their own names. The general act, section 51., giving a priority of claim, does not expressly give it against the assignees of bankers, in that as well

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as in the local act, bankers must, if at all, be included in the words "*other persons*." Section 120. of the 57 G. 3. c. 29. gives the commissioners power to sue in the name of their clerk for penalties and rates, and in certain other cases particularly specified, but this case is not amongst them. Thirdly, it appears that originally *Marsh* and Co. had a written appointment as bankers to the commissioners, and no new appointment was ever made after Sir *J. Sibbald* died. Now when one of several partners retires, all contracts made with the old firm are at an end, *Weston v. Barton*. (a)

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ABBOTT C.J. I am of opinion that the power to sue in the name of their clerk, given to the commissioners by the 57 G. 3. c. 29. s. 120., cannot be limited in the manner contended for on behalf of the defendants; but that it includes the present case. With respect to the priority of claim given to the commissioners in certain events, I agree that the words "*other persons*," mean persons *ejusdem generis* with those before mentioned, but it seems to me that bankers are so, being virtually, although not nominally, treasurers. Lastly, as the statute does not require that bankers shall have a written appointment, I think that a new appointment in writing was not necessary after Sir *J. Sibbald* died, but that the employment of the then firm as bankers was equivalent to an appointment, and sufficient to make their assignees liable to pay the present demand in full.

Postea to the plaintiff.

(a) 4 Taunt. 673.

1826.

JAMES DOUGAN, Clerk to the Commissioners for paving certain Parts of the Parish of St. PANCRAS, *against* BOLLAND and Others, Assignees of MARSH and Others, Bankrupts.

Where bankers employed by commissioners of pavements had received on account of the commissioners certain exchequer bills, which they afterwards sold, and received the proceeds, and before this money had been paid to the commissioners, became bankrupts:

Held, that the commissioners were entitled, under the 57 G. 3. c. 29. s. 51., (set out in the last case) to recover in full from the assignees of the bankrupts the balance due to them; for that the section referred to was not confined to monies received by virtue of rates or assessments, but included all monies received "for and on account of the commissioners," and when the bankers sold the exchequer bills, they must be considered as having received the proceeds to the use of the owners of the bills.

DEBT brought by the plaintiff, as clerk of the commissioners appointed to carry into execution the local paving act 50 G. 3. c. 147., against the defendants, who are assignees of *Marsh, Stracey, Fauntleroy*, and *Graham*, bankrupts, under separate commissions, one against *Marsh, Stracey*, and *Graham*, and another against *Fauntleroy*, to recover the sum of 1999*l.* 11*s.* 5*d.*, as received by the said bankrupts to the use of the said commissioners, and which the defendants, it was insisted, were liable, as such assignees, to pay under the provisions in the general metropolis paving act 57 G. 3. c. 29. s. 51., which entitles paving commissioners to preference to other creditors. The declaration contained special counts, and also a general indebitatus count founded on the 57 G. 3. c. 29. s. 120. Plea, the general issue, on which issue was joined. At the trial, before *Abbott C. J.* at the *London* sittings in last *Trinity* term, a verdict was found for the plaintiff for 1999*l.* 11*s.* 5*d.*, subject to the opinion of this Court upon the following case: The local paving act 50 G. 3. c. 147. appoints commissioners for forming, paving, and otherwise improving certain streets and other public passages

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and places in the parish of *St. Pancras*, in *Middlesex*, which are or shall be made upon ground belonging to *Joseph Lucas*, Esq. The 3d section enacts, that the commissioners or any five of them shall put the act in execution. The 11th section enacts, that the commissioners shall by writing under their hands appoint a treasurer, clerk, and surveyor. The 64th section directs, that the commissioners may sue in the name of their clerk. The 51st section of the general public act 57 G. 3. c. 29. gives a preference to the commissioners of paying before all other creditors in the event of bankruptcy of the treasurer or other persons therein mentioned. (See the section set out in the last case.) On the 20th *June* 1810, at a meeting of the commissioners under the said first-mentioned act, certain proceedings took place, of which the following is a copy, as entered in the book of the commissioners kept in pursuance of the act: "At a meeting of the commissioners held at the *Boot* public-house, on the estate, on *Wednesday* the 20th day of *June* 1810, present (here the names of fourteen commissioners were inserted, and also a copy of a notice of the meeting which had been given,) Resolved, that Mr. *Fauntleroy* be appointed treasurer to this commission." Then followed other resolutions, and the entry concluded as follows: "Resolved, that this meeting do adjourn to *Wednesday* the 18th day of *July*, at 2 o'clock precisely. (Signed) *James Barton*." The said *Henry Fauntleroy* from the 20th *June* 1810, until his bankruptcy, was and continued to be a partner in the late banking-house of Messrs. *Marsh* and Co., consisting of the said *Marsh*, *Stracey*, *Fauntleroy*, and the other persons hereinafter mentioned. The said commissioners under the local paving act also, as such

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commissioners, employed Messrs. *Marsh* and Co. as the bankers of the said commissioners as such commissioners, and a pass-book was kept, debiting *Marsh, Sibbald, Stracey, Fauntleroy*, and *Stewart*, to the commissioners for paving the estate of *Joseph Lucas, Esq.*, which pass-book was headed or entitled as follows :

“ Drs.

Crs.

<i>Marsh, Sibbald, Stracey,</i>	The commissioners for pay-
<i>Fauntleroy, and Stewart.</i>	ing the estate of <i>Joseph Lucas, Esq.</i> ”

M. Stewart retired from the partnership in the year 1814, and *Sir J. Sibbald*, another of the partners above named, died in the month of *September* 1819. *Graham* became a partner with the survivors on the 1st day of *May* 1814, and *Marsh, Stracey, Fauntleroy*, and *Graham* continued from that time to be employed as the bankers of the commissioners until the time of their bankruptcy; and, as such bankers, *Marsh, Stracey, Fauntleroy*, and *Graham*, on the 4th day of *June* 1824, received exchequer bills of and belonging to the commissioners, and for and on their account as such commissioners, amounting in value to the sum of 1750*l.* 17*s.* 2*d.*, and a clerk of the bankers delivered to the commissioners a receipt as follows :

“ No. 6. *Berners Street*, 4th *June* 1824.

Received on account of the *Lucas Paving*, seventeen hundred pounds in exchequer bills.

For Messrs. *Marsh, Stracey, Fauntleroy*, and *Graham*,
£1700. Jos. GOLIGHTLY.”

Marsh, Stracey, Fauntleroy, and *Graham*, as such bankers of the commissioners, afterwards, and before they became bankrupts as hereinafter mentioned, received the
proceeds

proceeds of the said exchequer bills, amounting to 1750*l.* 17*s.* 2*d.*, which sum, on the 13th *September* 1824, being the time of the bankruptcy of *Marsh* and Co., remained in their hands, together with the further sum of 248*l.* 14*s.* 3*d.*, which latter sum was the balance of the banking account in favour of the said commissioners, and which sum of 248*l.* 14*s.* 3*d.* was collected and received by virtue of rates and assessments made under and by virtue of the said first-mentioned act. On the 16th day of *September* 1824, a commission of bankrupt duly issued against *Marsh*, *Stracey*, and *Graham*, and subsequently, on the 29th day of *October* 1824, another commission duly issued against *Fauntleroy*, and the defendants were duly appointed, and became assignees under both commissions, as stated in the declaration. The defendants, as such assignees of *Marsh*, *Stracey*, *Fauntleroy*, and *Graham*, jointly, as well as separately, have received, and are possessed of, from and out of the joint estate, and also out of the respective estates of *Marsh*, *Stracey*, *Fauntleroy*, and *Graham*, more money than will be sufficient to pay and satisfy to the commissioners and the said plaintiff the said sums of 1750*l.* 17*s.* 2*d.* and 248*l.* 14*s.* 3*d.* On the 25th day of *January* 1825, the commissioners by their then and present clerk (the plaintiff) did in writing demand, by and on the behalf of the commissioners, of and from the defendants, as such assignees as aforesaid, the payment of the said sums of 1750*l.* 17*s.* 2*d.* and 248*l.* 14*s.* 3*d.*; and after ten days had expired from the time of such demand this action was commenced.

Chitty, for the plaintiff, was stopped by the Court.

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F. Pollock, contra, contended, that this case differed from the last, because the eleventh section of the local act, 50 G. 3. c. 147., required a treasurer to be appointed, in writing under the hands of the commissioners; that the appointment of *Fauntleroy* not being signed was bad, and that the bankrupts, *Marsh and Co.*, could not be considered as treasurers, as they had no appointment. Secondly, that the plaintiff could not, in this action, recover the amount of the exchequer bills, for that it did not appear that the money was raised by rates and assessments; and if it was, still the proceeds could not be considered as money received on account of the commissioners: they should have brought trover for the bills.

Chitty, in reply, contended, that it was not necessary to shew any appointment. That the case disclosed a dealing between the commissioners and the bankers in the ordinary manner, as between a banker and his customers, and that the 120th section of the public act gave the commissioners a right to receive in full the balance in their favor, and that the money produced by the sale of the exchequer bills was money had and received to the use of the commissioners.

Cur. adv. vult.

The judgment of the Court was, on a subsequent day in this term, delivered by

ABBOTT C. J. In this case it appears that the bankrupts, *Marsh and Co.*, had no appointment in writing as bankers to the commissioners, but were employed by them in the same manner as by private individuals. *Fauntleroy* was appointed treasurer; it is true, that this appointment was not made under the hands of the commissioners, or in the manner pointed out by the eleventh section

section of the local act, but an appointment in writing is not required by the general act 57 G. 3. c. 29. *Fauntleroy*, however, did not act as treasurer during the period in question; the monies of the commissioners were paid into the house of *Marsh and Co.* The question then arises, whether a banker so employed is within the 51st section of the 57 G. 3. c. 29. That section shews clearly, that the legislature contemplated the payment of monies belonging to the commissioners, to other persons besides treasurers and collectors; it speaks generally of *persons appointed by the commissioners*, and does not require such appointments to be in writing. The words are, "That in case any treasurer or collector, officer, or other person appointed by the commissioners, for the collection and receipt of monies, &c. shall happen to die or become bankrupt before he or they shall have fully paid and satisfied all monies received by him or them for or in respect of any such rates or assessments, or for or on account of the commissioners, &c.," the assignees of such bankrupt shall pay the commissioners in preference to any other debt, except debts due to the king. We think that this section does apply to bankers, and that the employment of them by the commissioners is equivalent to an appointment, the statute not requiring it to be in writing. Then comes the question as to the two sums. Upon reading the fifty-first section, we think it is not confined to money received by virtue of rates or assessments, but that it extends to all monies received for or on account of the commissioners. Now with respect to the sum of 1750*l.* 17*s.* 2*d.*, it is stated, that on the 4th of June 1824, *Marsh and Co.* received exchequer bills of and belonging to the commissioners, and for and on their account as such commissioners, amount-

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ing in value to 1750*l.* 17*s.* 2*d.* Afterwards, and before their bankruptcy, *Marsh* and Co. received the proceeds of the exchequer bills, amounting to the sum before mentioned, which remained in their hands at the time of the bankruptcy. When they sold the bills and received the proceeds, they must be considered as having received the money for the use of the owners of the bills. The other sum of 248*l.* 14*s.* 3*d.* was received on account of rates and assessments. We are, therefore, of opinion, that the plaintiff is entitled to recover both sums; and as this was a dealing between the commissioners and the house at large, the verdict may be entered against the defendants, as assignees of the joint estate.

Postea to the plaintiff.

Friday,
June 2d.

STUDDY *against* SANDERS and Another.

Where a contract was made between *A.* and *B.*, whereby *A.*, having a quantity of apples, agreed to sell his cyder to *B.* at a certain price per hogshead, to be delivered at *T.*

at a future time, and to lend such pipes as he had for the use of the cyder, to be manufactured on his, *A.*'s premises, and to be paid for before it was removed, and *A.*, in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by *B.* to manufacture the cyder on *A.*'s premises, and before the cyder was completely manufactured, it was seized by the excise-officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as *B.*'s property, together with the casks, and in assumpsit for goods sold and delivered, brought by *A.* against *B.*, it appeared that the word *cyder*, at the place where the contract was made, meant the juice of the apples as soon as it was expressed: it was thereupon held, that the contract must be construed to have been for the sale of cyder in that sense of the word, and that the property passed to *B.* as soon as the apple juice was delivered to his servant. Secondly, that it was *B.*'s duty to enter the premises, and as through his default it became impossible for *A.* to deliver the goods at *T.*, the failure to do so did not bar his action. Thirdly, that *A.* might recover in this action the price of the casks lent to the defendant.

plaintiff,

INDEBITATUS assumpsit, brought to recover the sum of 508*l.* 16*s.*, the sum of 386*l.* 15*s.*, part thereof, being the price of 221 hogsheads of cyder alleged to have been sold by the plaintiff to the defendant, the sum of 110*l.* 1*s.*, other part thereof, being for the loan or hire, and for the price of certain casks furnished by the

plaintiff, according to the contract set forth in the case, and the sum of 12*l.* being money paid by the plaintiff to the use of the defendants. At the trial before *Burrough J.*, at the *Devon* Summer assizes, 1828, a verdict was found for the plaintiff, subject to the opinion of this Court, upon the following case. The plaintiff, in the year 1819, was possessed of a considerable quantity of apples, the growth of his own land, cultivated by himself; and he, on the 29th *October* 1819, entered into the following contract with the defendants, who were cyder merchants, carrying on business at *Bristol*. "It is agreed, on this 29th of *October* 1819, between *Thomas B. Studdy* (the plaintiff) and *W. Sanders* and Co. (the defendants), that the aforesaid *Studdy* has sold his cyder at 35*s.* per hogshead, to be delivered at *Totness*, in the Spring of the year 1820, and the cyder or wine-pipes that he has empty for the use of the said cyder, to be manufactured in premises of his, the said *Studdy's*; and for the lent of such casks the aforesaid *Sanders* and Co. are to pay 1*s.* per hogshead, in addition to the aforesaid 35*s.*, in all 36*s.* per hogshead; and the said 36*s.* per hogshead is to be paid, one moiety at *Christmas* next, and the other half before the cyder, or any part, is taken from the said *Studdy's*. Signed, *Thomas B. Studdy*, *William Sanders* and Co. — N. B. The aforesaid *Studdy* is to put the said casks lent in good repair for working; and it is expected that the cyder will be from two to three hundred hogsheads; if more, *Sanders* and Co. agree to take it. And if *Sanders* and Co. want to take or draw off the premises any of *Studdy's* casks, they are to pay 30*s.* per pipe for them." After the making of the above contract, the defendant, *Sanders*, engaged one *Hunt*, at a salary of 1*l.* per week, to manu-

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facture the cyder for the defendants, and gave him directions to apply for such articles as he might want to his, *Sanders*'s, brother, and to other persons named by *Sanders*, and to obtain what money he wanted from the plaintiff; and *Hunt* accordingly obtained from the plaintiff sums of money to the amount of 12*l*. The apples were afterwards pounded, and the juice expressed by the plaintiff's servants; and the juice, or cyder, as it is called in Devonshire, was by the plaintiff's servants then put into casks, partly belonging to the plaintiff, and partly provided by *Sanders*, and delivered to *Hunt* upon the plaintiff's premises, for the purpose of being manufactured there. *Hunt* was directed by *Sanders* to be particular in receiving the cyder from the plaintiff's people, to see that he had the proper measure, and that the casks delivered to him were full. The whole process of manufacture was in the hands of *Hunt*, and of a person employed by him, by the defendants' directions, and *Hunt* procured brimstone casks, and other articles required from the persons named by the defendant, *Sanders*, and according to his directions. *Sanders* occasionally attended, and gave directions to *Hunt* about the manufacture of the cyder, and nothing remained to be done by the plaintiff to the cyder after the delivery to *Hunt*, except what, if any thing, the contract required; but the plaintiff claimed to be entitled to prevent the removal from off his premises, until he should be paid the price. *Hunt* was on *Studdy*'s premises manufacturing the cyder for twelve weeks, when the same was seized as hereinafter mentioned; the racking was not finished, it was in different stages of its progress. Between the date of the contract and the time of the seizure hereinafter mentioned, 221 hogsheads of cyder had been expressed
by

by the plaintiff's servants, and delivered to *Hunt*, and he had, during that interval, been employed in manufacturing the cyder. After the delivery of the cyder to *Hunt*, nothing remained to be done to it by the plaintiff except as aforesaid; whatever was further required was to be done by *Hunt*. Cyder, in the course of manufacture, diminishes in quantity after the average of six or eight gallons per hogshead.

By the statute of 3 G. 3. c. 1. s. 25. it is enacted, "that every person who shall, after the 25th day of *March* 1763, sell any quantity of cyder or perry, or either of them, in less quantity than twenty gallons at a time, whether the same be made from fruit of his own growth, or from bought fruit, shall be deemed and taken to be a dealer in cyder and perry, and a retailer thereof, and shall be subject and liable to the duty of four shillings per hogshead for such quantity of cyder and perry so sold, over and above all other duties payable for cyder and perry sold by retail; and that every dealer in and retailer of cyder and perry, and other person receiving into his custody any quantity of cyder and perry, or either of them, for sale, and every person who shall buy any fruit to make into cyder or perry, or either of them, for sale, shall make a true and particular entry in writing of the several and respective storehouses, rooms, cellars, vaults, and other place and places by him made use of for the making and keeping of cyder and perry, or either of them, at the office of excise within the compass or limits whereof such respective storehouses, rooms, cellars, vaults, and other place or places shall be situated, on pain of forfeiting the sum of 50*l*. for every such storehouse,

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place which, from and after, 1763, shall be made use of by any retailer, receiver or maker rendering such entry thereof as aforesaid. 42 G. 3. c. 93. s. 17. it is further enacted in case any of the goods, wares, merchandise or commodities for or in respect whereof duties of excise are imposed by any act or acts of parliament in force immediately before the passing of the said act shall be fraudulently deposited, hid, or concealed in any place or places whatsoever, with an intent to defraud his majesty of any of the duties of excise by any such act or acts of parliament imposed for or in respect thereof, all such goods, wares, merchandizes, and commodities respectively shall be forfeited, together with the packages containing the same, and shall and may be seized by any officer or officers of excise." The plaintiff's premises were not entered. *Hunt* never saw the plaintiff before he applied to him respecting the cyder in question. At the time the communication took place between *Sanders* and *Hunt*, *Sanders* told him he had bought the plaintiff's cyder, but that he, *Hunt*, might as well say to any body who enquired, that he, *Hunt*, was the plaintiff's servant, as defendants did not wish it to be publicly known that they had bought the cyder, as they had given a longish price for it. An accident took place during the manufacturing of the cyder, the floor gave way, and four or five hogsheads of the cyder were lost, which are not included in the demand in this cause. On the 3d day of *January* 1820 the officers of excise came to the plaintiff's premises, and informed the plaintiff that they had come to search for cyder belonging to *Sanders*, a dealer, whereupon the
cyder

cyder in question, amounting to 221 hogsheads, was shewn to them, and they were informed by the plaintiff that such cyder had been sold by him to the defendants, but that he did not consider the cyder as the property of *Sanders* and Co., the defendants, until it was delivered according to the agreement, and that *Hunt* was his servant; which statement *Hunt* confirmed. The officers seized the cyder, and it was afterwards condemned in the Court of Exchequer, as being the property of the defendant, *William Sanders*, found in an unentered place, and a verdict for 750*l.* was obtained against *William Sanders*, on an information filed by his majesty's Attorney-General for penalties under the statute of 3 G. 3. c. 1. s. 25., in respect of the omission to enter the premises where the cyder was deposited; and the same was paid by the defendants. After the making of the contract for the purchase of the cyder, the same remained on the premises of the plaintiff, under the circumstances herein stated. After the seizure of the cyder the plaintiff made an application to the excise for its restoration, stating the fact of sale to *Sanders* in his memorial, but claiming the cyder to have been his property at the time of the seizure; but his application was refused. *Hunt* was the servant of *Sanders* for the purpose of receiving and manufacturing the cyder, but was the servant of the plaintiff for the purpose of retaining the cyder until payment should be made by the defendants of the price. The case was now argued by

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Tindal for the plaintiff. The only question is, whether the property was in the defendants at the time of the seizure. That depends upon whether any thing remained

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mained to be done by the plaintiff before the delivery of the cyder. If there was any thing to be done it became impossible by the wrongful act of the defendants. By the contract, it appears that the cyder was to be manufactured on *Studdy's* premises. But although it is not expressly stated that it was to be manufactured by the defendants, yet looking at the whole of the contract, that is apparent. *Hunt*, who was to superintend the process, was the servant of the defendants. For the purposes of this contract the juice was to be considered as cyder as soon as it was expressed from the apples, and the sale was complete as soon as it was put into casks to be further manufactured by the defendants. The stipulation that the cyder should be delivered at *Totness*, may be relied on by the defendants, but that was only to fix the time of payment, and not the completion of the sale, for half the price was to be paid at *Christmas*, and the residue on removal. The agreement to remove the goods in the Spring, was only to shew that the price should be payable at that time. But if those words imposed on the plaintiff a duty to deliver at *Totness*, then it is a sufficient answer that the defendants, by their own wrongful act, rendered it impossible. They cannot, therefore, set up as a defence that the cyder was not delivered at that place, *Co. Lit.* 207., 1 *Roll. Abr.* 453. l. 50. The plaintiff was not in fault. The law does not require a man to enter a place where he merely presses the apples; the defendants who made the cyder ought to have made the entry. The record in the *Exchequer* being a proceeding in rem, is a finding that the property was in the defendants. That court had the exclusive right to determine the question; the record is therefore

therefore conclusive, *Scott v. Shearman (a)*, *Hughes v. Cornelius (b)*, and in many cases the record of a foreign court of admiralty has been held conclusive (c).

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F. Pollock contra. The property never vested in the defendants; the plaintiff, therefore, had not any right to sue by virtue of the contract, neither did the seizure and condemnation give him any such right. The plaintiff does not claim to be paid for that which during the process was lost by accident, and he cannot be in a better situation with respect to that which was lost by the seizure. Nothing was to be claimed until the manufacture was complete, and after that a delivery at *Totness* was necessary in order to perfect the plaintiff's claim, *Astey v. Emery (d)*. The period of payment does not touch the question. It is quite consistent that part of the price should be paid at *Christmas*, and the residue on removal of the goods from the premises, although the plaintiff was bound to make delivery at *Totnes*. No cyder existed at the time of the supposed vesting of the property. The whole contract was executory, the apples were merely the raw material. [*Bayley J.* Suppose the defendants had taken away the goods in the first stage of the process?] Then they might have been liable to be sued for goods sold and delivered, but here they never had possession of the thing contracted for, and, therefore, according to *Tempest v. Fitzgerald (e)*, are not liable to the action. [*Bayley J.* In that case there was no possession under the contract.] Neither was there here, the contract was to sell the cyder when the process had been completed, and,

(a) 2 W. BL. 977.

(b) 2 Show. 232.

(c) See 1 Stark. on Ev. 238.

(d) 4 M. & S. 262.

(e) 3 B. & A. 680.

therefore,

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therefore, neither a count for goods sold and delivered, nor for goods bargained and sold, can be maintained. With respect to the seizure, it is clear that if there were any crimen, the plaintiff was particeps. But the record does not prove that the goods were the property of the defendants, they were not condemned as the goods of *Sanders*, but as goods deposited by him in an unentered place. The plaintiff stated a falsehood to the officers, which constituted the whole offence. The casks cannot be considered as goods sold and delivered, nor can the sum of 12*l.* be recovered, if both parties were in *pari delicto*.

BAYLEY J. (*a*) If there had been any contrivance between these parties to hold the plaintiff out to the public as the manufacturer of cyder for himself, I should have thought them in *pari delicto*; and if there had been any circumstances to satisfy a jury that the transaction was fraudulent, with a view to deceive the officers of the revenue, I should have thought the plaintiff could not recover. I do not say that the case is free from suspicion; but there is not sufficient to warrant an inference of fraud. The bargain was for the sale of the plaintiff's cyder, at 35*s.* per hogshead, to be delivered at *Totness* in the Spring of 1820, and to be manufactured on the plaintiff's premises. Now *cyder* is an equivocal term. It may apply to the juice, when first expressed from the apple, or to the manufactured article when the whole process is complete. We must look to the condition and language of the parties to see what was meant. It is found in the case, that the juice, when first expressed from the apple, is in *Devonshire* called *cyder*, and, there-

(*a*) *Abbott C. J.* was sitting at *Nisi Prius*, in *London*.

fore,

fore, any person looking at this contract, would suppose that to have been sold, and not manufactured cyder. If it had been understood between the parties that the plaintiff was to manufacture the cyder, it is probable that some contract as to the mode of carrying on the process would have been introduced. But on the contrary, when the bargain was made, *Hunt* was hired by the defendants, the juice was expressed and put into casks, part of which were the property of the plaintiff, and part were provided by the defendants. *Hunt* received from the defendant, *Sanders*, directions, which plainly shew what the parties meant by the word *cyder*. He was to take care that the casks were filled, when delivered to him, and was to pay according to the quantity of juice, and not of the manufactured article. The case then stands thus; the plaintiff bargains to deliver apple-juice; he bargains, also, that when it has been manufactured into perfect cyder he will carry it to *Totness*; but it is not to be taken from his premises until the price has been paid. It was further agreed, that it should be delivered in the following Spring. The raw material may be considered as goods bargained and sold, or goods sold and delivered, and the plaintiff was entitled to recover, when the period fixed for payment arrived. It appears, then, that the juice was delivered to *Sanders*, upon the terms that it should be taken away and paid for in the Spring, and that *Studdy* should have a lien for the price. In the mean time a transaction occurred, by which possession of the article was taken from both parties, not by means of the wrongful act of the plaintiff, but of the defendants. It was their duty to enter the place where the cyder was to be manufactured, and through their neglect it became impossible for the plaintiff

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tiff to carry the manufactured article to *Totness*; that cannot take away his right to recover.

HOLROYD J. I am of opinion that the plaintiff is entitled to recover. If this were a contract for the sale of cyder in a manufactured state, the plaintiff would have been a dealer within the meaning of the statute, and must have entered the place and paid the duty accordingly. But no person seems to have thought him liable to that; in the understanding of the parties, the thing sold was the juice of the apples. The jury found that *Hunt* was the defendants' servant; and if so, there was not sufficient to shew that the plaintiff was implicated in the fraud upon the revenue. But an objection has been taken to the form of the action, the contract being executory. I cannot accede to the argument; for I think it clear that although an action would lie upon the express contract, yet that when it was part executed and the thing delivered, *indebitatus assumpsit* was maintainable. In *Bull, N. P. 139.* it is said, "Although an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed, yet when that is done, it raises a duty for which a general *indebitatus assumpsit* will lie." I take this to be the reason for the common practice of introducing two counts in declaring upon the sale of a horse, one upon an executory and the other upon an executed contract, although it is clear the plaintiff might recover upon the last after delivery. There can be no doubt that immediately upon the delivery of the juice to *Hunt* the property was altered, and any subsequent loss, not happening through the plaintiff's fault, must have been borne by the defendant. Then will an action lie for
the

the price, the time fixed for payment having expired, but no delivery having been made at *Totnes*? I think that does not bar the plaintiff's right of action, the default having been occasioned by the act of the defendants. If a party does all he can to perform the act which he has stipulated to do, but is prevented by the wrongful act of the other party, he is in the same situation as if the performance had been perfected. I think also that the action lies for the value of the casks; the defendant had them in use, and has not returned them.

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LITLEDALE J. If there had been sufficient evidence to make out collusion between the plaintiff and defendants to defraud the revenue, the plaintiff could not enforce his contract in this court. But although there was ground for suspicion, fraud was not found, and we should not be warranted in presuming it. I think that the plaintiff's right to recover depends entirely upon the meaning of the word *cyder* as used in this contract. The word being ambiguous, parol evidence was admissible to explain it; and from the evidence given, I think that here it meant the apple juice, and that the property passed to the defendants as soon as possession of it was given to their servant *Hunt*. And this governs the whole case; for if the mere juice was sold, the defendant ought to have entered the premises. If the juice was sold, the payment would depend upon the quantity of that, otherwise the sum to be paid could not be ascertained until the process of making the cyder was complete; and any loss in the interim would fall upon the plaintiff. The objection to the form of action depends also upon the same point; for if the juice was sold,

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sold, then as soon as it was expressed from the apples, and delivered to the defendants, it was goods sold and delivered. For these reasons, I think that the plaintiff is entitled to recover.

Postea to the plaintiff.

Friday,
June 2d.

The KING against M'KAY.

Upon a quo warranto information for usurping the office of bailiff (he being the returning officer) of a borough sending burgesses to parliament, but not a town corporate, judgment having been given for the crown : Held, that the relator was not entitled to costs by the 9 Ann. c. 20.

UPON an information in the nature of quo warranto, charging the defendant with usurping the office of bailiff (the returning officer) of *Stockbridge*, a borough sending members to parliament, but not a town corporate, judgment had been entered for the crown; and thereupon the master of the crown-office allowed costs to the prosecutor. *Merewether* obtained a rule for reviewing that taxation, and in *Easter* term *Adam* and *Carter* were heard against the rule, and *Merewether* in support of it; but all the authorities then cited are so fully stated and considered in the judgment of the Court, that it is unnecessary to report the arguments.

The judgment of the Court was now delivered by

BAYLEY J. The question in this case was whether, in an unincorporated borough sending members to parliament, the returning officer (the bailiff) was within the statute 9 *Anne*, c. 20., and the case stood over, that the authorities upon the point might be referred to and considered. There had been a quo warranto information against him, upon which the master of the crown-office had allowed costs; and the point was, whether costs were allowable or not. This depended wholly

wholly on the statute 9 *Anne*, c. 20. That statute imports, by its title, to have passed to render the proceedings upon writs of mandamus and informations in the nature of a quo warranto more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations *and boroughs*. The act recites that divers persons had intruded themselves into the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and places in *England* and *Wales*; and that where those offices are annual, it is difficult to bring the right to trial within a year, and where they are not annual, it is difficult to do so *before they have done divers acts in their offices prejudicial to the peace, order, and good government within such cities, &c.* It also recites that divers persons who had right to such offices, or to be *burgesses or freemen* of such cities, have illegally been removed or refused admittance, having no other remedy to procure admittance or restoration to their said offices, or franchises of being *burgesses or freemen*, than by writs of mandamus, the proceedings on which are dilatory and expensive; and then it provides for speedy obedience to such writs, for proceedings upon the returns thereto, and for damages and costs thereon. It then provides for quo warranto informations in respect of any of the said offices or franchises, it directs the mode of proceeding thereon, and provides for costs for or against the relator, and directs that the statute 4 *Anne*, c. 16. and all the statutes of jeofails shall extend to the proceedings on such writs of mandamus and quo warranto informations. The statute then recites a distinct and independent mischief, viz. the re-electing for successive years in divers counties, boroughs, towns corporate, and cinque ports, the mayor, bailiff, or other officer to whom it belongs to

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preside at the election, and make the return of members to serve in parliament, where such officer is annually elected, and enacts and declares that no person who hath been in such office for one whole year shall be capable of being chosen for the year ensuing. Upon this statute the question is, whether those parts of it which relate to writs of mandamus and quo warranto informations extend to boroughs which are not corporations, and in which the officer or officers that exist have nothing to do with the government of the place, or whether they are confined to corporate places and corporate officers. The first case in which this question appears to have been mentioned (as far as I have been able to find) is *Rex v. Boyles*(a), where, upon a quo warranto information to show by what authority the defendant claimed to be one of the bailiffs of *Southwold*, which was described as an office of trust and pre-

eminence, and touching the rule and government and the administration of justice within the said vill, it was urged for the defendant that the statute of *Anne* was declaratory in what cases a quo warranto lay, and that this office, as described, was not within the preamble of the act. The Court did not, as is supposed *arguendo* in *Rex v. Wallis* (b), decide that the office was within the statute, but denied that the statute was exclusive of cases not recited in the preamble, meaning probably that quo warranto informations would lie in other cases than those to which the act refers. The first important case is *Rex v. Williams* (c). The question there was not upon any distinction between corporations and boroughs which were not corporations, but upon the distinction in a corporation between usurping a corporate office and

(a) *Fitz.* 82. 2 *Ld. Raym.* 1559. *Sir.* 836.

(b) 5 *T. R.* 375.

(c) 1 *Burr.* 402.

exercising

exercising a non-corporate right. The information there was to show by what authority the defendant held a court of record within the borough of *Denbigh*. The judgment was for the crown, and costs were awarded under the statute; and the question was whether the award of costs could be supported. There was no doubt but that the place, *Denbigh*, was a town corporate; but the defendant had not usurped a corporate office, he had merely exercised a non-corporate right. Lord *Mansfield* observed, that the act was meant to extend to all officers of corporations as such, but it was not within its reason or meaning that it should extend to all offices exercised within the limits of the corporation. The title could not control the body of the act, and there being no charge of usurping any office, the judgment as to the costs was wrong. *Denison J.* stated, that "franchises" in the act, meant corporate rights, or rights to freedom in corporations, and *Foster J.* said it meant freedoms and rights to be members of the corporation. This case, therefore, though it *decides* nothing expressly as to the distinction between corporations and boroughs which are not corporations, contains dicta that the act refers only to corporate rights, and if it be confined in corporations to corporate offices, it cannot extend to non-corporate offices in unincorporated places. In *Rex v. Marsden (a)*, *Yates J.* says, "The statute 9 *Anne* extends only to corporation offices." In *Rex v. Wallis (b)*, the question was whether the statute applied to a quo warranto information against the defendants for usurping the office of constables of *Birmingham*. *Birmingham* is not a corporation or borough, but it is a place, and the

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(a) 3 Burr. 1812.

(b) 5 T. R. 375.

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9 *Anne* c. 20. has the word "place," as well as "towns corporate and boroughs." There was a judgment for the crown, and costs were allowed to the prosecutor, and the question was, whether such allowance was right. The Court held it was not, because the word "places" in the 9 *Anne*, c. 20. s. 1. applied only to such places as were ejusdem generis with those enumerated, viz. cities, towns corporate, and boroughs; for had all places been intended, the legislature would have used one compendious word to comprehend all places, and *Buller J.* noticed the distinction between burthensome offices, such as that of a constable, and offices from which profit may be expected, such as corporate offices in corporations. He noticed also the expression by Lord *Mansfield* in *Rex v. Williams*, that it is not within the reason or meaning of the act that it should extend generally to all offices within a corporation, and drew the inference that Lord *Mansfield* must have thought that there was no office, not in a corporation, within the act. In *Rex v. Hall* (a) the same question occurred as in *Rex v. Williams*, whether the statute applied to a non-corporate office (the office of register and clerk of the court of requests), in a corporate place (the city of *Bristol*), and *Abbott C. J.* referred to *Rex v. Wallis* as deciding that the word "places," meant places ejusdem generis with those mentioned in the act, and that *Birmingham* not being a city or town corporate, was not a place within the act, and added as his own opinion, that "other offices," must mean offices ejusdem generis with those mentioned, which are all corporate offices. In *Rex v. Richardson* (b), upon a quo warranto inform-

(a) 1 *B. & C.* 237.(b) 9 *East*, 469.

ation against the portreeve of the borough of *Penryn*, which is not a corporate borough, the defendant obtained a rule nisi to plead several matters, and insisted that he had a right to do so, because the borough returned members to parliament, and was therefore within the statute of *Anne*, which gives a right to plead double in cases within that act; but upon cause shown, the Court considered *Rex v. Wallis* as in point, that the statute only applied to corporate offices, and discharged the rule. The case of *Rex v. Highmore* (a) is the only case I am aware of which has come before the Court, wherein a doubt appears to have been entertained upon the point. The question was, whether on a quo warranto information against the bailiff or sub-bailiff, who is the returning officer of *Milburn Port*, which is a borough which sends members to parliament, but is not a corporation, the defendant was entitled to plead double: *Abbott* C.J. during the argument said, the words "burgesses or freemen" seemed to confine the statute to places having burgesses or freemen, but the rule to plead several matters was made absolute, because, if the Court discharged the rule the defendant would have been precluded from setting the matter right by writ of error, whereas if they made it absolute and the defendant pleaded double, the error, if it were one, would appear upon the record, and the judgment of a higher tribunal might be taken upon the point. This case, therefore, appears to have proceeded not so much upon the ground that the Court had doubt, as upon the principle that the question, if any, should be open to the investigation of a court of error. And upon this state of the autho-

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(a) 5 B. & A. 771.

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rities, where there is not one that expresses any doubt, where one, viz. *Rex v. Richardson* is in point, and where every other except that of *Rex v. Highmore*, which is no authority either way, proceeds avowedly upon the principle that the statute applies only to corporate offices (and there can be no corporate office but in a corporation) the error in those decisions must be palpable, and the words of the statute very plain and unequivocal, before we can act in opposition to the principle upon which those decisions proceed. But when we consider that the word "boroughs" in the title of the act may be satisfied by referring it to the last section, which prohibits the choice of a returning officer for two successive years, and that in that preamble which introduces the provisions for writs of mandamus and quo warranto informations, we find mention made of the peace, order, and government of the place, with which a bailiff as returning officer has nothing to do, and of burgesses or freemen, which occur only in corporations, we think it impossible to say that it is clear the provisions as to writs of mandamus and quo warranto informations apply to unincorporated boroughs, and on the contrary it appears to us that they apply wholly to *corporate offices* in *corporate places*. The consequence is that the rule must be made absolute.

Rule absolute.

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REPLEVIN. Avowry, that defendant was seised of the close in question, and demised it, amongst others, to *A. B.*, and for rent in arrear distrained the cattle in question, being in the close in which, &c. Plea in bar, that the cattle were not levant and couchant on the close in which, &c. Demurrer, assigning for causes, that the plea in bar did not state that the cattle escaped into the place in which, &c., by the default of the owner or tenant thereof; and that it was not averred in the plea, owing to what cause, or under what circumstances the cattle came upon the close in which, &c. Joinder in demurrer.

Replevin. Avowry, that the defendant demised the close, in which, &c., (amongst others,) to *A. B.*, and because the cattle were there he distrained them for rent-arrear. Plea in bar, that the cattle were not levant and couchant upon the close, in which, &c. : Held, on demurrer, that the plea was bad; first, for not shewing how the cattle came upon the land; secondly, for not stating that they were not levant and couchant upon any part of the lands demised.

Richards in support of the demurrer. The plea in bar is bad, for it tenders an immaterial issue. That the cattle were not levant and couchant is no protection against a distress for rent, unless they came upon the land through the default of the tenant or the owner. The only instance of such a plea is in *Kempe v. Crews* (a); and there, *Treby* C. J. said that it would be bad on demurrer. Here, the defendant has adopted that course.

Maule contra. It is contended, that levancy and couchancy is material only when the cattle come upon

(a) 1 *Ld. Raym.* 167.

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the land by the default of the tenant or owner; but that is not so. In 3 *Bl. Com.* 8. it is said: "With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are taken. If they are put in by consent of the owner of the beasts; they are distrainable immediately afterwards for rent-arrear, by the landlord. So, also, if the stranger's cattle break the fences and commit a trespass, by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts, for the wrong committed through his negligence. But if the land were not sufficiently fenced so as to keep out cattle, the landlord cannot distrain them till they have been levant and couchant on the land." In this latter case, levancy and couchancy is material, although the tenant or owner be not in default. *Blackstone* then goes on to say, that where the lessor or his tenant is in default, cattle coming upon the land cannot be distrained, until after notice has been given to the owner, and he neglects to remove them. The passage in *Kempe v. Crews*, which is relied upon, was merely an obiter dictum, and the actual determination of the Court was in favor of the plaintiff.

Richards in reply. In the passage immediately preceding that which has been read from 3 *Bl. Com.*, it is said, that all things upon the land are *primâ facie* distrainable for rent. The owner of the cattle should, therefore, show in his plea in bar the special matter upon which he relies as a protection from that liability.

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BAYLEY J. (a) I am of opinion that this plea in bar is bad. It is a general rule that all things upon the premises are distrainable for rent-arrear. There are exceptions to that rule; but he that wishes to avail himself of the exception must bring himself within it. The mere want of levancy and couchancy is not sufficient to protect the cattle from a distress. If the cattle are upon the premises by the consent of the owner, or through his default, levancy and couchancy is immaterial. Now it is to be presumed, that the circumstances under which the cattle come upon the premises are within the knowledge of the owner; he, therefore, should state them. The case of *Kempe v. Crews* is a clear authority upon this point. There, trespass was brought for taking the plaintiff's cattle. The defendant justified taking them upon land demised by him to one *W.* for rent-arrear. Replication, that they were not levant and couchant. Defendant took issue upon that, and after it was found for the plaintiff, he moved for a repleader, which was refused, because the issue might be material; and a repleader is never granted, unless the issue must be immaterial. But it was admitted in argument that the replication would have been bad on demurrer; and *Treby* C.J. expressly says, "that if the defendant had demurred upon the replication it would have been ill." There is another objection in this case: the defendant avows, stating that the tenant held the close in which, &c. *amongst other lands*; the plaintiff pleads in bar that the cattle were not levant and couchant on the close in which, &c.: that might be true, and yet they might have been so upon some part of the lands demised.

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(a) *Abbott* C. J. was sitting at Nisi Prius, in London.

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HOLROYD J. I agree that the plea in bar is bad on both grounds. It is a general rule, that all things on the land are distrainable for rent-arrear. An avowry is therefore good, merely stating that the cattle were upon the land. If the owner wishes to avail himself of an exception, he must bring himself within it.

Judgment for the defendant. (a)

(a) *Littledale J.* had gone to Chambers.

Monday,
June 4th.

HURST and Others against JENNINGS.

A bond, upon the face of it, appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an

THIS action was brought upon a bond dated the 13th of November 1824, in the penal sum of 10,000*l.*, conditioned for payment to the plaintiffs of 8000*l.*, and interest, on the 13th of January 1825. By an indenture of the same date, stamped with a 12*l.* ad valorem stamp, and made between the defendant of the one part and the plaintiffs of the other part, reciting that the defendant was then justly and truly indebted to the plaintiffs in the sum of 3500*l.* or thereabouts, for goods sold and delivered, and money lent and advanced

action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breaches or executing a writ of inquiry: Held, first, that this was a bond substantially conditioned for the performance of an agreement, within the 8 & 9 W. 3. c. 11. s. 8., and that the obligees ought to have assigned breaches.

Secondly, that the indenture, by virtue of which the judgment was entered up, was, in legal effect, a cognovit actionem within the meaning of the third section of the 5 G. 4. c. 39., or if not, that it was a contrivance to defeat the provisions of that statute, and the indenture not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the Court, upon an application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn.

by

by them to him, and for a considerable part whereof plaintiffs had received, as a security, various bills of exchange and notes of hand not then at maturity; and that defendant, the better to enable him to carry on his trade and business, had occasion to raise a considerable sum of money, and for the purpose of raising the same had applied to the plaintiffs, who had agreed to draw upon the defendant five several bills of exchange for 1000*l.* each, to bear even date with the indenture, and to be made payable respectively at twelve, fifteen, eighteen, twenty-one, and twenty-four months after date; and which bills of exchange being accepted by the defendant, they, the plaintiffs, had agreed to get discounted, and to hand over the proceeds thereof unto him the defendant. And then, after reciting the bond, it was by the indenture witnessed that for declaring the purposes for which the bond was executed, it was agreed between the parties, and the defendant did thereby declare that it should be lawful to and for the plaintiffs to commence an action upon the said bond or obligation, and proceed to judgment thereon whenever they should think fit; and that upon judgment being obtained, they should be at liberty, according to their will and pleasure, at any time, and from time to time, to issue one or more execution or executions upon the judgment as they might be advised and deem expedient. And the parties declared and *agreed* that the bond was so made, and that any judgment obtained thereon should stand and be, as a security for payment to the plaintiffs, on demand and without any deduction or abatement whatsoever, of all such sums of money as then were or might *thereafter* become due from the defendant to the plaintiffs for goods sold and delivered, or to be sold and delivered, or
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for monies advanced or paid, or to be advanced or paid by them, or any or either of them, to, for, or on account of the said five bills of exchange, or to, for, or on any other account, or on behalf of the defendant, or which the plaintiffs had, or might become liable for, or engage to pay for the defendant, or for which he the defendant should at any time thereafter become indebted to the plaintiffs on any account whatsoever, with lawful interest; and also for the purpose of effecting a full and complete *indemnity* to them in respect thereof. On the 21st of *January* 1825, the plaintiffs commenced an action upon the bond, and obtained judgment by nil dicit; which judgment was signed on the 3d of *February* 1825. On the 14th of *January* 1826, the plaintiffs caused an execution to be sued out upon the judgment, under which execution the sheriff levied upon the goods and chattels of the defendant for 847*3*l. 12*s.* 10*d.*, besides sheriff's poundage. The goods and chattels seized under the execution remained upon the premises of the defendant on and after the 3d of *February* 1826. On that day a commission of bankrupt was awarded against the defendant, under which he was declared a bankrupt, and a provisional assignment of his estate and effects executed by the major part of the commissioners. A rule nisi had been obtained calling upon the plaintiffs to show cause why this execution should not be withdrawn.

Rumball now showed cause. The question intended to be raised is, whether under the statute 6 G. 4. c. 16. s. 108. the execution is void. In *Taylor v. Taylor* (a)

(a) Ante, 392.

the Court decided that such an execution was not wholly void under this statute, and refused to set it aside. [The Court here suggested that the question was of very general importance, and admitted of too much doubt to be decided upon motion, and intimated that it might be fit to state the facts in a special case for the opinion of the Court.]

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F. Pollock, in support of the rule, stated that there were two other grounds on which the execution should be withdrawn. The first was that the judgment and execution thereon were void by the statute 3 G. 4. c. 39. s. 1. (a), because the indenture was in the nature of a warrant of attorney to confess a judgment, or a cognovit actionem, and had not been registered pursuant to that act. Secondly, that there had been no suggestion of breaches or writ of inquiry, as required by the statute of the 8 & 9 W. 3. c. 11. s. 8.

Rumball.

(a) The 3 G. 4. c. 39. s. 1. recites, that injustice was frequently done to creditors by secret warrants of attorney, to confess judgments for securing the payment of money, whereby persons in a state of insolvency were enabled to keep up the appearance of being in good circumstances; and the persons holding such warrants of attorney had the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of their creditors, and for remedy thereof enacts, "That if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in the court of K. B., or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of docket and judgments in the court of K. B."

Sect. 2. enacts, "that if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt

v. Hollister (a). The defendant might, notwithstanding this covenant, have defended the action. The indenture therefore is very different in its effects from a warrant of attorney or *cognovit actionem*, and is not within either the words or the meaning of the statute. Secondly, the Court will not set aside this execution on motion. The statute, section 2., enacts, "that such warrants of attorney, and the execution thereon, shall be deemed fraudulent and void against the assignees; and such assignees shall be entitled to recover back and receive for the use of the creditors of the bankrupt, all and every the monies levied or effects seized under and by virtue of such judgment and execution." If the execution be void, there is no necessity for the Court to order it to be withdrawn, for the assignees may bring an action for the goods seized under the execution, and it will be no defence to such an action. In an action the question would receive a more solemn decision, and the parties might carry the cause into a court of error; of which privilege a decision of the question on motion will deprive them.

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ABBOTT C. J. This is an application to the Court, in terms, to compel the plaintiff to withdraw an execution, or in effect to set aside an execution. The only object of this application is to vacate the execution, not the judgment. If we see that the execution has issued on a judgment, which has been obtained by means of a contrivance, devised to evade the provisions of an act of parliament or any rule of the common law, we ought not to allow the execution to continue in force so as to have

(a) 1 *Wils.* 129.

that

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that effect. I am clearly of opinion that the bond and indenture, by virtue of which the plaintiffs were authorized to enter up judgment and sue out execution, were devised with the intention to evade the provisions of the statute 3 *Geo. 4. c. 39.* That statute, in order to give publicity to warrants of attorney to confess judgment, enacts, that such instruments shall be registered in the manner therein mentioned, within twenty-one days after the execution thereof. It appears that in this case the defendant, on the 14th of *November, 1824*, executed a bond conditioned for the payment to the plaintiffs of 8,000*l.* and interest on the 13th of *January, 1825*, and that by an indenture, of the same date with the bond, reciting that the defendant was indebted to the plaintiffs in the sum of 8,500*l.*, and that he had occasion to raise more money, and had applied to the plaintiffs for that purpose, it was witnessed that for declaring the purposes for which the bond was executed, it was *agreed between the parties* that it should be lawful to the plaintiffs to commence an action on the bond, and proceed to judgment when they should think fit, and that upon judgment being obtained they should, at their will and pleasure, at any time issue one or more execution or executions upon the said judgment; and it was further agreed that that judgment should be a security, not only for monies already advanced, but for any monies which might thereafter be advanced. The deed, therefore, authorizes the plaintiffs, without giving any notice to the defendant to commence the action, to proceed to judgment, and issue execution. If this is not a case within the very words of the act of parliament, the judgment, by virtue of which the execution has issued, has been obtained by means of a contrivance used for the purpose,
and

and calculated to have the effect, (if it be allowed to remain in force,) of defeating the provisions of that act of parliament; and on that ground I think the execution which has issued upon that judgment ought not to stand. If it were allowed to continue, the contrivance would have the effect of defeating another very wholesome act of parliament, the 8 & 9 W. 3. c. 11. s. 8., which requires that the plaintiffs shall suggest breaches in all actions upon bonds conditioned for the performance of covenants and agreements. This is a bond conditioned nominally for payment of a sum certain, but substantially conditioned for the performance of an agreement, that the plaintiffs shall be at liberty to enter up judgment, and issue execution for any monies which may thereafter become due from the defendant to the plaintiffs. I think this is a case within the statute, and that the plaintiffs were not entitled to issue execution, without having first assigned breaches. The rule for withdrawing the execution must be made absolute.

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HOLROYD J. I think that this execution ought to be set aside. This is a case either directly within the act of parliament, or the deed and judgment were a contrivance to defeat the provisions of it. By the first section every warrant of attorney must be filed within twenty-one days after execution in the manner therein mentioned. By section 2., "if it has not been filed within that time, it is to be deemed fraudulent against the assignees, under any commission of bankrupt afterwards issued against the party giving the warrant." It is clear, therefore, that if the instrument executed in this case had been a warrant of attorney instead of a bond:

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and indenture, the judgment and execution would have been void against the assignees, because the provisions of the statute had not been complied with. Section 3. recites, that the former provision may be defeated by a person giving a *cognovit actionem* instead of a warrant of attorney to confess judgment, and enacts that every *cognovit actionem*, unless filed in like manner, shall be void against the assignees. It appears to me, that the deed set out in the affidavit has the legal effect of a *cognovit actionem*, for it enables the plaintiffs, without giving any previous notice to the defendant, to commence an action against him, and to proceed to judgment, and to issue execution when they shall think fit. There is nothing in this deed to prevent the plaintiff's saying that the defendant has confessed the action. I incline, therefore, to think, that this is a case within the words of the third section of the statute; but if it be not, the judgment has been obtained by means of a contrivance, devised to defeat the provisions of the Act of parliament, and I think the execution sued out upon a judgment so obtained ought not to be permitted to stand.

LITLEDALE J. The bond in this case, upon the face of it, purports to be a bond for the payment of a sum certain; but by an indenture of the same date, it appears to be conditioned for the performance of an agreement. For it is there stated, that it was declared and agreed, that the plaintiffs should be at liberty to enter up judgment when they thought fit; and that such judgment should be a security, not only for monies then advanced, but for all sums to be thereafter advanced. If that agreement had been incorporated in the condition
of

of the bond, it is quite clear that the plaintiffs must have assigned breaches. And although parol evidence is not admissible to shew that the condition of a bond is different from that which the words of it import, yet, as in this case, the purposes of the bond are declared, by an instrument of as high a nature, executed on the same day, I think this a bond conditioned substantially for the performance of an agreement within the words of the act; and I think it clearly within the mischief intended to be remedied. One of the objects of the statute was, to take away the necessity of proceedings in equity, to obtain relief against an unreasonable demand of the whole penalty, where small damages only had accrued. If such a case as the present had occurred before the statute, the defendant would have been compelled to seek relief in equity. I think this a case within the words and the object of the statute 8 & 9 W. 3. c. 11. s. 8., and that this rule for withdrawing the execution must be made absolute.

Rule absolute.

Marryat. F. Pollock, and *Justice*, were to have argued in support of the rule.

1826.

HURST
against
JENNINGS.

1826.

Monday,
June 5th.

WARMOLL and Another against YOUNG.

IN an action against the sheriff for a false return of nulla bona to a writ of fieri facias, the sheriff proved that he had seized all the goods of the debtor under a fieri facias in another suit, before the plaintiffs' writ was delivered to him. The plaintiffs, in answer, proved that the judgment upon which the first execution was sued out was entered up upon a warrant of attorney fraudulently executed by the debtor, in order to defeat the plaintiffs' execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff, on the first day of the next term, was served with a rule to return the writ of fieri facias under which he had first levied. He did not give any notice to the plaintiffs, by whom the second fieri facias had been sued out, that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff, at whose suit the first fieri facias had been sued out: Held, that this was misconduct in the sheriff, and rendered him liable to the plaintiff in the second execution.

Quære, Whether the sheriff, if not guilty of such negligence or misconduct, would have been liable to the action.

Knight

Knight v. Gooch, as proceedings would be taken for setting aside the judgment and execution. The defendant having proved that he had levied all *Gooch's* goods under the execution at the suit of *Knight*, the plaintiffs then proposed to give evidence to shew that the judgment obtained by *Knight* was fraudulent and void, upon the ground of its having been entered up by virtue of a warrant of attorney executed by *Gooch* for the express purpose of defeating the plaintiffs' execution. The Lord Chief Justice was of opinion, that in this action for a false return against the sheriff (who was not indemnified) it was not competent to the plaintiffs to shew that another judgment and execution, under which the sheriff had previously levied, was fraudulent and void; but upon its being suggested that Lord *Kenyon* had permitted such evidence to be given (*a*), the Lord Chief Justice received the proof, but reserved liberty to the defendant to move to enter a nonsuit in case a verdict should be found for the plaintiffs. Evidence of the fraud was then given. It further appeared, that, on the first day of *Hilary* term 1825, the sheriff was served with a rule in the cause of *Knight v. Gooch* to return the writ. He did not give any notice to the plaintiffs that he had been served with such rule; and on the 31st of *January* the sheriff's officer paid over to *Knight* the sum of 58*l.* 9*s.* 6*d.*, the net proceeds of the goods levied under the execution. The Lord Chief Justice told the jury, that the only question for their consideration was, whether the warrant of attorney was fraudulently given by *Gooch* to *Knight*, in order to defeat the plaintiffs' execution. If they thought it was, they ought to find for the plaintiffs, otherwise for the de-

1826.

 WARMOLL
against
YOUNG.

(a) *Kemland v. McCauley*. *Peakes, N. P. C.* 65,

1825]

Wansell
against
Yeovil

defendant. The jury found a verdict for the plaintiffs for 58*l.* 9*s.* 6*d.* A rule nisi for entering a nonsuit was obtained in *Hilary* term upon the objection taken at the trial.

Gurney and Campbell shewed cause. The question of fact raised in this action was, whether *Goock* had any goods and chattels in the defendant's bailiwick at the time when the fieri facias sued out by the plaintiffs was delivered to the defendant. If the judgment obtained by *Knight* was valid, then *Goock* had no goods; but if it was fraudulent and void, then the goods in the possession of the sheriff still continued to be the property of *Goock*, and the sheriff ought not to have returned nulla bona. The statute 27 *Eliz.* c. 5. declares judgments fraudulently contrived with intent to delay creditors, to be (as against them) utterly void and of none effect. The jury have found that this judgment was fraudulent. It is therefore absolutely void. Now, a judgment creditor may, in this form of action, give evidence to shew that a transfer of the property by the debtor is colourable, and made with a view to protect the goods from an execution; or, if an assignment has been regularly executed, so as to transfer the goods (as between the debtor and assignee), still a plaintiff may give evidence to shew that, as against a creditor, it is void under the statute 13 *Eliz.* c. 5. *Dovey v. Baynton* (a). But if it be competent to a plaintiff to shew that a deed purporting to transfer the property is void on the ground of fraud, there is no reason why he should not also be permitted to shew that a judgment is void upon the same ground. In *Crosley v. Arkwright* (b), a person against whom a writ of fieri facias

(a) 6 *Edw.* 257.(b) 3 *T. R.* 305.

was sued out was in possession of the goods under a deed given in consideration of an antecedent debt, and an annuity payable from thenceforth; and it was held that the sheriff was warranted in returning nulla bona, it appearing that the memorial of such annuity was not registered according to the directions of the annuity act, and the deed being, on that account, absolutely void. In *Kempland v. Macaulay* (a), the action was for a false return, and the defence was, that the plaintiff's writ was fraudulently sued out to cover the goods. But, assuming that the plaintiff cannot in this form of action dispute the validity of a prior execution under which the sheriff has levied, the sheriff in this case has made himself liable by lending himself to one of the parties. He received notice from the plaintiffs to retain the money, and having been served with a rule to return the writ, it was his duty to inform them that he had been served with that rule; but on the 31st of January he paid over the money to Knight, without giving any such information. He has, therefore, contrary to his duty, paid over the money to a party who had no title to receive it, and must stand or fall by that person's title.

1826.

 WARRANT
 against
 Young.

Marryat and *Comyn* contra. Where the sheriff is indemnified by either of the execution creditors, there, although the action may be nominally against the sheriff for a false return, it is substantially a suit between the respective creditors, and it is competent to either to show that the other has no title to the goods of the debtor, by proving that the transfer made by the debtor (whether by assignment or by judgment obtained against him,) is void; but where the sheriff is not indem-

(a) *Peake's N. P.* 65.

1826.

WARMOLL
against
YOUNG.

nified, he is not only the nominal but the substantial defendant: in such case it is no answer to a former levy to say that the process was issued fraudulently. He is the ministerial officer of the court; and is not bound to inquire into the title of the party at whose suit the execution issues. Such an inquiry would occasion great delay in the execution of process, and would subject the sheriff to an expence which he is not bound to incur. In *Tyler v. The Duke of Leeds* (a), the action was against the defendant, lord of the manor of *Wakefield*, for a false return of *nulla bona* to a mandate from the sheriff of *York*, upon a writ of *fieri facias* to levy upon the goods of *J. Shaw*, at the suit of the plaintiff. The bailiff seized the goods as the joint property of *Shaw* and one *Bateman*, the latter being in possession. *Bateman* claimed the whole of the property, and the bailiff relinquished it on being indemnified by *Bateman*. It was proposed, on the part of the defendant, to shew that the judgment against *Shaw* arose out of a fraudulent contrivance between the plaintiff and *Shaw* to defraud the creditors of the latter. But Lord *Ellenborough* seems to have thought, that, in this form of action, it was not competent to the defendant to go into evidence of collateral fraud, although he might, by direct evidence, attack the judgment; and the evidence was not received. In *Kempland v. Macauley* (b), the sheriff was merely a nominal defendant, the real defendant being another creditor, who had sued out an execution against the goods of the debtor. Secondly, after the notice given by the plaintiffs, it was incumbent upon them to apply promptly to the Court to set aside the execution obtained by *Knight*: they had ample time for so doing.

(a) 2 Stark. 218.

(b) Peake's N. P. C. 68.

and

and not having done it, the defendant might fairly conclude that they did not mean to contest the judgment.

1826.

WARMOLZ
against
Young.

ABBOTT C. J. I think we are not called upon in the present case to decide the general question, whether it is competent to a plaintiff in an action against the sheriff for a false return, to shew that a judgment and execution by virtue of which the goods of the debtor were previously seized, were fraudulent; because if it appears by evidence that the sheriff by himself, or by his officer, whom he entrusts with the execution of his process, lends his aid to one party, and withholds it from another, then I think the sheriff must stand or fall by the rights of that party to whom he lends his aid. It appears that on the 29th of *December* a notice was given to the sheriff by the present plaintiffs, requiring him to retain the amount of the levy, and that the plaintiffs would apply to the Court to set aside *Knight's* judgment. On the 23d of *January* the sheriff was served with a rule to return the writ — a six-days' rule. He could not be called upon, in any course of proceeding, to pay over the money to *Knight* till after the expiration of the sixth day. At that time his officer, not the sheriff himself, for he has never interfered, paid over the money to the attorney for *Knight*. It appears to me, that it was the duty of the sheriff, when served with the rule to return *Knight's* writ, to inform the present plaintiffs of it, that they might consider whether they could take steps promptly to set aside the judgment. If he had informed them of it, and they had taken no steps, there would have been strong ground to maintain that the sheriff was justified in obeying the first process that came to his hand. Not having so informed the plain-
tiffs,

1858.

WARRICK
against
Young.

tiff, I think the sheriff appears to have lent himself to *Knight*, and therefore he must stand or fall by the right that *Knight* had; and *Knight* had no right, for his judgment was evidently fraudulent.

BAYLEY J. I think that the evidence was properly received, not because it had the effect of showing that the judgment under which the first execution was sued out was void, but because it shewed that the sheriff did not stand indifferent between the parties, and that he wrongfully paid over the money to one of two claimants, to the prejudice of the other, such payment being made to that one who had no right to receive it; and I think that our decision in this case will be calculated to make sheriffs act bona fide. Here there was a fraudulent judgment and execution, and an honest judgment and execution. The sheriff was not bound to try the question of fraud, or to decide which of the two creditors should have the preference; but he ought to have stood indifferent between the parties, and not to have lent himself to either. Having received notice from the creditors who sued out the second *fi. fa.*, that the first judgment was questionable, he ought to have given notice to them, that he had been served with a rule to return the writ, and that unless they took some steps before that rule expired, he should be forced to pay over the money to the plaintiff in the first execution. The sheriff did not adopt that course. If he had, the plaintiffs might have taken upon themselves to resist *Knight's* execution. The question then would have been between *Knight* and the present plaintiffs; instead of which the sheriff's officer lent himself too readily to *Knight*, in order to give him the preference.

HOLROYD

HOLROYD J. The writ of *fi. fa.* does not command the sheriff to pay over to the plaintiff the money which he levies, but to bring it into Court, that it may be rendered to the plaintiff in satisfaction of his damages. It is the duty of the sheriff to retain the money in his hands, in order to allow parties to apply to the Court to set aside an execution, which may be sued out for fraudulent purposes; and if the sheriff were not bound to retain the money, it might, in many instances, be mischievous. Here the officer of the sheriff paid over the money to the plaintiff in the first execution. I have entertained some doubt, in the course of the argument, whether the present plaintiffs ought not, in pursuance of the notice they gave to the sheriff, to have applied to the Court, within the first six days of term, to set aside *Knight's* execution, and to have the money paid over to them. But I incline to think that it was the duty of the sheriff to have informed the plaintiffs, before he paid over the money, that he had been served with the rule to return the writ. He was, therefore, guilty of negligence in paying over the money to *Knight*; and as the latter had no right to receive it, the defendant must be answerable for the consequences of his negligence. This rule must, therefore, be discharged.

Rule discharged. (z)

(z) See *Saunders v. Bridge*, 5 B. & A. 95.

We have been informed by Mr. Bowles, of Shaftesbury, the attorney for the trustees of Lady Arundell, in the cause of *Dewey v. Bayntun* (6 East, 257.), that the sheriff was indemnified.

1826.

WARWICK
against
YOUNG.

1826.

Monday,
June 5th.

In the Matter of BURT.

Where an award under the 9 & 10 W. 3. c. 15. was made after the essoign day but before the quarto die post: Held, that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term next following,

AN award in this case had been made on the 1st day of *June* 1825, under a submission which had been made a rule of Court. The essoign day of *Trinity* term was the 30th of *May*. A rule nisi for setting aside the award was obtained in *Michaelmas* term 1825, upon certain grounds therein specified, which it is unnecessary to mention. The statute 9 & 10 W. 3. c. 15. enacts, that an arbitration or umpirage obtained by undue means shall be esteemed void, and be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to arbitration *before the last day of the next term after such arbitration made or published to the parties.*

Bolland and *Sheppard* shewed cause. The award was made before *Trinity* term, and the application to set it aside ought to have been made in that term. The first day of *Trinity* term was the 3d of *June*. The essoign day is no part of the term within the meaning of the act of parliament. The object of the legislature was that either of the parties should have an opportunity of applying to set aside the award during all the days of the next term when the Court is sitting. Here the party had an opportunity of making his application during all those days. The statute 32 H. 8. c. 21. s. 2. enacts, that *Trinity* term shall begin the *Monday* next after *Trinity*
Sunday

Sunday for the keeping of the essoigns, proper returns, and other ceremonies heretofore used and kept, and that the *full term* of the said *Trinity* term shall begin the *Friday* next after *Corpus Christi Day*, &c. This statute distinguishes between the essoign day and the full term. The statute 9 & 10 *W. 3. c. 15.* must have contemplated the full term; that being the only term during which the complaint there mentioned could be made to the Court.

1826.

In the Matter
of BURN.

Alderson contra. The essoign day is in law the first day of the term, within the meaning of the statute 9 & 10 *W. 3. c. 15.*; and after the passing of that statute, a single judge regularly came, and sat in the court and heard motions on the essoign day. All legal acts relate to that day, and not to the *quarto die post*; and a judgment entitled of a particular term has relation to the essoign day of that term, *Stanford v. Cooper* (a). In *Bolton v. Eyles* (b), the essoign day was considered to be part of the term, so that in the interval between that day and what is commonly called full term, a bill might be filed against the Warden of the *Fleet*, which at that time could not be done during the vacation; and in a still later case of *Laidler v. Elliott* (c), it was held, that that interval was to be considered part of the term within the meaning of the rule of Court, *Hilary*, 26 *G. 3.* which requires, that, in case of a surrender in discharge of bail, the prisoner shall be supersedable, unless the plaintiff shall cause him to be charged in execution, within two *terms* next after such surrender, and due notice thereof. These are authorities to shew that

(a) *Cro. Car.* 102. (b) 2 *Bro. & Bing.* 51. (c) 3 *B. & C.* 738.

the

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the essoign day is in law the first day of the term, and that being so, then *Michaelmas* term was the term next after the making of the award, and the rule was obtained in proper time.

Per Curiam. The essoign day for some, but not for all purposes, is considered the first day of the term. In order to enter up judgment upon an old warrant of attorney, the affidavit must state not merely, that the party was alive after the essoign day, but after the *quarto die post*. On the other hand, there are many instances, some of which have been mentioned, where the essoign day has been considered the first day of the term. And upon the whole we think, that the statute 9 & 10 *W. 3. c. 15. s. 2.* which enacts, that the application to set aside an award shall be made before the last day of the *next term* after the arbitration made, had reference to that which in legal proceedings has been generally considered the term. *Stanford v. Casper* (a) shews, that the essoign day is in law the first day of the term, and that all legal acts relate thereto, and not to the *quarto die post*. We think that *Michaelmas* term was the term next after the award made, within the meaning of this act of parliament, and consequently that the application to set aside the award was not too late.

The case was then heard upon the matters disclosed in the affidavits, and ultimately the rule was discharged.

Rule discharged.

(a) *Cro. Car.* 109.

1826.

**DOE on the Demise of GARNONS against
KNIGHT.**

THIS was an ejectment brought to recover possession of certain messuages and lands in the county of *Flint*. The lessor of the plaintiff claimed the property as mortgagee under a deed purporting to be executed by *W. Wynne*, deceased. At the trial before *Garnon B.* at the *Summer assizes* for the county of *Stafford*, 1825, the principal question turned on the validity of that deed; and the following appeared to be the facts of the case: *Wynne* was an attorney residing at *Mold* in *Flintshire*, and had acted in that character for *Garnons* the lessor of the plaintiff, who resided at a distance of about three miles from *Mold*. *Wynne's* sister and niece lived in a house adjoining to his own at *Mold*. On the 12th of *April* 1820, about six o'clock in the evening, *Wynne* called at his sister's house, his niece then being the only person at home, and asked her to witness or sign some parchment. He produced the parchment, placed it on the table, signed his name, and then said, "I deliver this as my act and deed," putting his finger at the same time on the seal; the niece signed her name, and he took it away with him. The deed remained on the table until he took it away. He did not mention to his niece the contents of the deed, or the name of *Mr. Garnons*. The niece had no authority from *Mr. Garnons* to receive any thing for him. It was proved by *Miss Elizabeth Wynne*,

Where a party to any instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to shew that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential.

Delivery to a third person for the use of the party in whose favor the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom

the deed is so delivered be not the agent of the party for whose benefit the deed is made.

the

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the sister of *Wynne*, that in *April* 1820, but (whether before or after the execution of the deed as above mentioned did not distinctly appear,) he brought her a brown paper parcel, and said, "Here, *Bess*, keep this: it belongs to Mr. *Garnons*." Nothing further passed at this time; but a few days after he came again, and asked for the parcel, and she gave it to him: he returned it back to her again on the 14th, 15th, or 16th of *April*, saying, "Here, put this by." When she received it the second time, it was less in bulk than before. *Wynne* died in *August* 1820. After his funeral, she delivered this parcel to one *Barker* in the same state in which she received it from her brother. *Barker*, who was an intimate friend of *Wynne*, stated, that the latter in *July* 1814 sent for him, and told him that he had received upwards of 26,000*l.* upon Mr. *Garnons*' account; and after taking credit for sums he had paid, and placed out for Mr. *Garnons*, he was still indebted to him in more than 13,000*l.* He then asked the witness, if he, as his (*Wynne*'s) friend, would see Mr. *Garnons* to explain the circumstances. The witness consented, and *Wynne* then made a statement of his property; by which it appeared that after payment of his debts, including the 13,000*l.*, he would have a surplus for himself and family of 8000*l.* at the least. He desired the witness to tell *Garnons* that, although he could not pay him at that time, he would take care to make him perfectly secure for all the monies due from him. Upon this being communicated to *Garnons* he desired *Barker* to assure *Wynne*, that he would not then distress him, or expose his circumstances, but he expected that he would provide him securities for the money he, *Wynne*, owed him. This was communicated to *Wynne*, who expressed great
gratitude

gratitude to *Garnons*, and said, he would take care to make him perfectly secure. After the funeral of *Wynne*, his will was produced, and with it was a paper in his own hand-writing, containing a statement of his property, and a list of various debts secured by mortgage or bond, and among others, under the title "*mortgage*," there was stated to be a debt to Mr. *Garnons* for 10,000*l*. Miss *Wynne* soon after delivered to the witness, *Barker*, a brown paper parcel sealed, but not directed. Upon this being opened, there was inclosed in it another white paper parcel directed, in the hand-writing of *Wynne*, "*Richard Garnons, Esq.*" Within it was a mortgage deed (the same that was witnessed by *Wynne's* niece, as before stated,) from *Wynne* to *Garnons* for 10,000*l*. There was also within the white parcel, a paper folded in the form of a letter directed in the hand-writing of *Wynne* to Mr. *Garnons*. That contained a statement of the account between *Wynne* and *Garnons*, and 10,000*l*., part of the balance due from *Wynne* to *Garnons*, was stated to be secured upon *Wynne's* property. The mortgage deed found in the parcel was then delivered to *Garnons*. It was a mortgage of all *Wynne's* real estates. It was contended on the part of the defendant that nothing passed by the deed, inasmuch as there had been no sufficient delivery of it to the mortgagee, or to any person on his behalf, to make it valid; and, secondly, because it was fraudulent and void against the creditors of the grantor under the statute 13 *Eliz. c. 5*. The learned Judge overruled the objections, and the defendant then proved that Mr. *Wynne*, in May 1820, had delivered to him a bond and mortgage of his real estates, to secure money due from *Wynne* to him; and that by his will he devised all his estates to the defendant, *Knight*, in trust to sell and pay

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his debts. It was further proved, that about the 5th of *April* a skin of parchment with a 12*l.* stamp was prepared by *Wynne's* order, and for a few days he remained in his private room, with the door shut. A clerk entered the room, and found him writing upon a parchment: he afterwards locked the door. There was no draft of the mortgage in the office, and he never mentioned it. The whole of the deed was in *Wynne's* own handwriting. He had three clerks, and deeds were in the usual course of business executed in the office, and witnessed by himself and his clerks. The learned Judge told the jury, that the first question for their consideration was, whether the mortgage to the lessor of the plaintiff was duly executed by *Wynne* the deceased; but that if they thought it was originally well executed, the question for their consideration would be, whether the delivery to *Mrs. Elizabeth Wynne* was a good delivery; and he told them he was of opinion, that if, after it was formally executed, *Mr. Wynne* had delivered it to a friend of *Mr. Garnons*, or to his banker for his use, such delivery would have been sufficient to vest in *Mr. Garnons* the interest intended to be conveyed to him under it; and the question for them to decide was, whether the delivery to *Miss Wynne* was, under all the circumstances of the case, a departing with the possession of the deed, and of the power and controul over it, for the benefit of *Mr. Garnons*, and to be delivered to him either in *Mr. Wynne's* lifetime or after his death; or whether it was delivered to *Miss Wynne* merely for safe custody as the depository, and subject to his future controul and disposition. If they were of opinion that it was delivered merely for the latter purpose, they should find for the defendant, otherwise for the plaintiff. A verdict having been found for the plaintiff, *Campbell*

in

in last *Michaelmas* term obtained a rule nisi for a new trial, upon two grounds: first, that there had not been a sufficient delivery of the deed; and, secondly, that it was fraudulent as against creditors or purchasers within the stat. 13 *El. c. 5.* or 27 *El. c. 4.* Upon the first point he contended, that delivery was necessary to the execution of a deed; that there could be no good delivery unless made to the party intended to be benefited by it, or to some person acting on his behalf, or to a stranger expressly for his use; and he relied upon *Sheppard's Touchstone*, 57., where it is laid down, "that a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him, or it may be delivered to any stranger for and on the behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger without any such declaration, intention, or intimation, unless it be in a case where it is delivered as an escrow, it seems this is not a sufficient delivery:" and he contended, that in this case there was not any delivery to the mortgagee, or to any person on his behalf on the 12th of *April*; and that the subsequent delivery to Miss *Wynne* was not sufficient, because it did not put the deed out of the controul of Mr. *Wynne*, and there was no evidence to warrant the finding of the jury that Mr. *Wynne* had parted with the controul.

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Taunton and *G. R. Cross*, at the sittings in banc after *Hilary* term, shewed cause. It is not essential to the perfecting of a deed that it should be delivered to the party intended to be benefited by it. The law requires the solemn act of delivery in order to demonstrate beyond doubt, that the party making the instru-

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ment meant it to be his act. That cannot be shewn more clearly and unequivocally than by a declaration to that effect, made in the presence of the attesting witness at the time when the deed is executed. Such a declaration amounts to an absolute and formal delivery of the deed by words. There has in this case been such an absolute and formal delivery of the deed by words; and in that respect this differs from all the reported cases, where the delivery of a deed has been held to be imperfect. There is no authority to shew that it is essential to a deed that it should be delivered to the party intended to be benefited by it. Upon a review of the old authorities which are collected in *Comyns' Dig.* tit. *Fait*, (A. 3.) and *Viner's Abr.* tit. *Fait*, it will appear that wherever the question has arisen as to what constitutes a good delivery in law, the question considered has been whether, upon the first delivery, sufficient has taken place to amount either to a formal or a constructive delivery of the deed. A formal delivery is where the party at the time of executing the deed uses apt words to denote his intention, that from that time it shall operate as his deed. A constructive delivery is where the intention of the maker of the instrument to become bound by it is manifested, not by any express declaration of his intention, but by some act which is considered in law equivalent to such a declaration, as (in the following instances put in *Comyns' Digest*) by the tradition of the deed to the party, or by throwing it upon the table in his presence, with the intent that he should take it, or by the party saying, "Take it; it is sufficient for you." In these instances, although there is not any formal delivery of the deed, the intention of the party to perfect the deed is made manifest by the act done by him; and it is there-

therefore considered a constructive delivery of the deed. That it is the intention of the party executing the instrument which makes the act operate as a delivery is illustrated by the case of *Stanton v. Chambers*, cited from *Hale's MSS.*, in the notes to *Co. Litt.* 36 a. "The obligor seals obligation, and throws it upon the table without other circumstances; this is *not* a delivery. But if he throws it *towards the obligee*, or if the obligee immediately takes it, and the obligor says nothing, it is a delivery." The mere throwing the deed upon the table is not a constructive delivery of it, because it does not manifestly shew the intention of the obligor to become bound by it, or that the obligee should have the power of availing himself of the obligation; but the throwing it *towards the obligee*, or allowing him to take it up, is a constructive delivery, because either of those acts unequivocally denotes the intention of the obligor, that the instrument shall take effect as his deed. And this explains why the same act may operate as a constructive delivery, if it be done towards the party himself, but not if done towards a stranger; because in the one case it may, and in the other may not be sufficient to manifest the intention of the maker of the instrument that it should operate as his deed. In *Thoroughgood's case* (a) it is stated, "that in 19 *H.* 8. 8 a. a difference is taken when a writing is delivered to the party himself and when to a stranger, as it was there agreed, that a writing may take effect by actual delivery to the party himself without any words; and as a writing may take effect by actual delivery without words, so it may take effect by words without actual delivery; as if a writing is

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(a) 9 *Coke*, 137.

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sealed, and it lies in a window or upon a table, and the obligor saith to the obligee, See, there's the writing, take it as *my deed*, and he takes it accordingly, it is a good delivery *in law*." The first instance put is that of tradition to the party; the second instance seems to include both formal delivery and tradition. The distinction between a delivery to the party and to a stranger is commented upon in *Co. Litt.* 36 a. "If a man deliver a writing sealed, to the party to whom it is made, as an escrow, to be his deed upon certain conditions, &c., this is an absolute delivery of the deed, being made to the *party* himself; for the delivery is sufficient without speaking of any words, (otherwise a man that is mute could not deliver a deed,) and tradition is only requisite; and then, when the words are contrary to the act which is the delivery, the words are of none effect." There the tradition of the writing sealed to the *party* intended to be benefited by it manifests the intention of the party executing to be bound by it instantly, as much as if he had formally declared that to be his intention at the time. Lord Coke then goes on: "But it may be delivered to a stranger as an escrow, because the bare act of delivery to him without words worketh nothing." The mere tradition of a deed to a stranger does not shew it to be the unequivocal intention of the party to be bound by it, but "if he delivers it *as his deed* into the *hands* of a stranger, that is sufficient." *Com. Dig.* tit. *Fait*, (A. 3.) So in *Clayton's Reports*, 31., it was held, if A. deliver a deed made to J. S. to J. D., though he do not say to the use of J. S., yet this is a good delivery of the deed to J. S. *if he accept of it*." In this instance the deed is not perfected by the act done by the party; for the delivery
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of the deed does not become effectual until it is accepted by the party to whom it is made. Another instance put in *Com. Dig.* is, "If it be delivered *as his deed* to a stranger, to be delivered to the party upon the performance of a condition, it shall be his deed presently; and if the party obtain it, he may sue before the condition performed." This is an instance of an absolute delivery, by formal words, to a stranger, and is an authority to shew that if Mr. *Garnons*, in this case, had obtained the possession of this deed at any time, he might have sued upon it instantly. These authorities establish, that a deed once formally delivered is effectual in law, although a condition be subsequently annexed to it. The result of the authorities is, that the law looks to the delivery of the deed, (whether that be done by formal words or by any other act,) as manifesting the intention of the party to be presently bound by it. If that intention be manifested by a declaration in the words commonly used on that occasion, the instrument takes effect as the deed of the party from the moment when the formal delivery takes place. *Barlow v. Heneage* (a), *Clavering v. Clavering* (b), and *Lady Hudson's* case, there cited, are express authorities to shew, that a deed once formally executed, though kept by the executing party till his death and never published, is a valid deed, and takes effect from the time of execution. *Clavering v. Clavering* shews, that the estate conveyed by such a deed not only vests upon the execution of the deed, but that it cannot be divested by matter subsequent, and that it is not competent to the maker of it to destroy its legal effect even by cancellation.

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(a) *Prec. in Ch.* 210.(b) *Prec. in Ch.* 235. 2 *Vern.* 475.

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In the present case there was an absolute and formal delivery of the instrument as a deed on the 12th of April, in the presence of the attesting witness. But assuming that not to be so, there was a second delivery of it to Miss Wynne, with a clearly marked and unequivocal intention on the part of the maker of it, that it should be available as a security for Mr. Garnons. Then it is said that the control retained by the grantor over this deed, although never exercised, was sufficient to defeat its effect. First, the jury have negatived the fact, that Mr. Wynne had any control over the deed. And admitting that he had, *Barlow v. Heneage* (a), and *Clavering v. Clavering* (b), shew that where an absolute and perfect delivery has taken place, the existence of a power and control over the instrument by the grantor is immaterial, and that the very cancellation of it will not defeat its operation.

To the argument that the deed was void under the statute of the 13 *Eliz. c. 5. s. 2.*, as being made with the intent to defraud creditors, it is a sufficient answer, that there was no evidence to shew that any creditor was delayed or defrauded, *Estwick v. Caillaud* (c). Nor does the statute 27 *Eliz. c. 4.* make any difference. If the defendant relies upon Wynne's will, the question is between a creditor and a devisee, who is a volunteer, and not favoured in a court of equity: if he relies upon the mortgage to him, any objection made to the mortgage to Garnons is equally applicable to the other. Besides, the lessor of the plaintiff being a mortgagee, is to be considered a purchaser for a valuable consideration, and then the mortgage deed under which he claims is not within the stat. 27 *El. c. 4.*

(a) *Proc. in Ch.* 210.(b) 2 *Vern.* 473.(c) 5 *T. R.* 420.

Campbell and *Oldnall Russell* contra. There was no delivery of this deed on the 12th of *April*. Secondly, the delivery to Miss *Wynne* at a subsequent period was not sufficient to make the instrument operate as a deed. First, a deed takes effect not from the signing and sealing, but from the tradition or delivery of it; 2 *Black. Comm.* 307., *Grondit v. Baker* (a), *Chamberlain v. Stanton* (b), *Perkins*, 137. A delivery to the party himself, or to his authorized agent, is good by the usual formal words, or without formal words, by manual tradition; but if the delivery be made to a stranger, it is necessary to make some express declaration to the effect that it is delivered for, or on the behalf of, or to the use of the party to whom it is made, *Shep. Touchst.* 57. In *Co. Lit.* 36 a. it is said, "A deed cannot be delivered to a party as an escrow, because delivery to a party without words is sufficient; but it may be delivered to a stranger as an escrow, because the bare delivery to him without words worketh nothing:" and afterwards it is stated, "as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery, as if the writing sealed lyeth upon the table, and the feoffor or obligor saith to the feoffee or obligee, 'Go and take up the said writing, it is sufficient for you,' or 'it will serve the turn,' or 'take it as my deed,' or the like words, it is a sufficient delivery." Lord *Coke* in all these instances speaks of a delivery to the party. These authorities establish, that a delivery to the party with or without words is sufficient, but that a delivery to a stranger without words is not sufficient, because the bare delivery to him does not shew the in-

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(a) *Yelv.* 7.(b) *Cro. Eliz.* 122.

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tention of the maker of the instrument to become bound by it. Now there was no delivery on the 12th of *April* to the mortgagee or to his authorized agent, nor to any person to the use of the mortgagee. Mr. *Wynne* did not part with the possession of the deed for an instant. The name of Mr. *Garnons* was not then mentioned, and the attesting witness was wholly ignorant of the contents of the deed. The words used by Mr. *Wynne* would have been a sufficient tradition of the instrument, if there had been any deliverer present; but as that was not the case, it was necessary to the perfection of the deed that it should be delivered to Miss *Jones* (*Wynne's* niece) to the use of *Garnons*. In *Shelton's* case (a), lessee for years granted his term by deed, which he sealed in the presence of divers, and of the grantee himself, and it was read at the same time but not delivered, nor did the grantee take it, but it was left behind them in the same place. And it was held, that being left behind them, and not countermanded, it was a delivery in law. But in that case the grantee was present, it was sealed to him, and left by the parties. There was not a sufficient delivery on the 12th of *April* in this case, within any of the instances put in *Com. Dig. tit. Fait, (A 3.)* because it was not made either to the party or into the hands of Miss *Jones*, as in the case there cited from 2 *Rolle's Abr. tit. Fait, (K l 42.)* where it is said, "If *A.* make an obligation to *J.* and delivers it to *B.*, if *J.* gets the obligation he may have an action upon it, for it will be intended that *B.* took the deed for him as his servant." That is a case, therefore, where it was delivered to an agent having authority to receive it for

(a) *Cro. Eliz. 7.*

the obligee. Nor was this a sufficient delivery within the case of *Parker v. Tenant*, cited in *Com. Dig.* from *Dyer*, 192. "A. made a bond to B. for the use of C., and putting it into C.'s hands in the presence of B., says, 'This will serve,' and that was held to be a good delivery." There it was delivered to C. in the presence of the obligee, and C. must, therefore, have been considered the authorized agent of B. for the purpose of receiving it. There certainly have been some cases in equity where a deed has been held to be binding although it has not been delivered to the party or to any person for his use, as in *Sear v. Ashwell* (a), *Barlow v. Heneage* (b), *Clavering v. Clavering* (c). But this observation applies to all those cases, that the party by coming into a court of equity for relief admitted the deed to be well executed, for otherwise he might have had a remedy at law. In *Boughton v. Boughton* (d), the only question was, whether the will revoked the deed, and it was expressly stated that the deed was formal as to the execution. It must, therefore, be taken to have been duly signed, sealed, and delivered. In *Worrall v. Jacob* (e) it was admitted that the deed of appointment had been *duly executed* by the wife; the only question was as to the effect of its remaining with her after it had been executed. The fair inference is, that it had been duly delivered, and, therefore, that case affords no argument to shew that delivery is unnecessary to the due execution of a deed. In *Naldred v. Gilham* (f) it is expressly said that *Catherine*, the aunt, by indenture of covenant to stand seised, *settled* the premises on herself for life, re-

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(a) 3 Swanst. 411.

(c) 2 Vern. 473.

(e) 3 Meriv. 256.

(b) *Proc. in Chan.* 210.

(d) 1 Atk. 625.

(f) 1 P. Wms. 576.

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mainder to her nephew *Naldred* in fee, without any power of revocation, but though the aunt bespoke two parts thereof, yet she kept both in her own possession. It is clear, therefore, that the deed was duly executed, otherwise she could not have settled the premises. *Clavering v. Clavering* (a) is the only case where the deed is not found to have been duly executed. *Cotton v. King* (b) is an authority in favor of the defendant. There Lady *Cotton*, on the eve of a second marriage, executed deeds disposing of property among children of a former marriage, and delivered them into the hands of one *Brereton*, by whom they were prepared, declaring "that she had done that for the sake of her children." The Lord Chancellor there says, "As to the Lady *Cotton*, if she had executed these deeds, and kept them in her own hands or custody, and they had been got from thence, I do not think she should have been bound by them; so if they had been placed in the hands of her agent, for her agent's are her hands." But the Chancellor relies on the fact that there were duplicates of these deeds, and that she had declared it to be her intention and desire to put this out of her power. In *Taw v. Bury* (c) the obligor had parted with the possession of the bond. In *Murray v. The Earl of Stair* (d), the bond was delivered by the obligor as his deed; but the subscribing witness said, it was agreed it should remain in his hands till all securities should be delivered up; and it was held that the jury were justified in finding that it was delivered as an escrow. So in *Johnson v. Baker* (e) it was agreed by parol, before execution of a

(a) 2 Vern. 473.

(b) 2 P. Wms. 357.

(c) *Dyer*, 167.

(d) 2 B. & C. 82.

(e) 4 B. & A. 440.

composition deed, that it should be void unless executed by all the creditors. The surety executed in the usual way as his act and deed, and it was held to be only an escrow. In *Wilson v. Balfour* (a), bankers while solvent, and before contemplating bankruptcy, being indebted to a particular customer, wrapt up certain securities belonging to them in an envelope inscribed with his name, and inclosing a memorandum stating that they had deposited the securities with him as a collateral security, but gave no information to the customer till the eve of their bankruptcy, when they sent him the parcel saying they must stop the next day. It was held that the customer could not retain the securities against the assignees of the bankers. Lord *Ellenborough* there says, that the bankers only *intended to deliver* the bonds to the customer; the whole rested in intention; the possession was never put out of themselves. So here the act of delivery was incomplete; the whole rested in intention. Assuming, then, that there was no sufficient delivery on the 12th of *April*, the question is, whether what took place afterwards, when Mr. *Wynne* gave the deed to his sister, and desired her to keep it, amounts to a delivery. The evidence raised a strong presumption that the mortgage deed was not contained in the first parcel delivered to Miss *Wynne*. But if it had been there, the circumstance of her delivering it up again to her brother, and his retaining it several days without any objection made by her, shews that he preserved a power and control over it. When the parcel was re-delivered it was without direction, and nothing was said about Mr. *Garnons*. If *Wynne* had intended the deed to take effect

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(a) 2 *Campb.* 579.

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in his lifetime, he had ample opportunity of delivering it himself to Mr. *Garnons*, for they lived within a short distance of, and frequently saw, one another. Having, therefore, preserved a control over the deed, it must be taken that he delivered it to his sister to keep for him, and not to be held by her as the agent of *Garnons*. The jury, indeed, have found that *Wynne* parted with the possession and control over the deed, but there was no evidence to warrant that finding. The learned Judge told them that if it was Mr. *Wynne*'s intention, that the parcel should be delivered after his death to Mr. *Garnons*, that would be sufficient. That, however, would not have been an absolute delivery, but would have shewn that *Wynne* did not mean to part with the control over the deed.

But admitting this deed to have been well delivered, still it is void by the operation of the 13 *Eliz. c. 5.*, against creditors, or against a subsequent purchaser by the statute 27 *Eliz. c. 4.*, being a fraudulent deed within the meaning of those statutes. If it was handed over to a person to hold for Mr. *Garnons*, it was not fraudulent; but if the deed remained in the possession or power of the grantor, then it was fraudulent. That ought to have been explained to the jury. There was evidence that Mr. *Wynne* was insolvent when he executed the deed. *Hassells v. Simpson* (a) shews that a voluntary preference to bonâ fide creditors by deed, is an act of bankruptcy; and *Cadogan v. Kennett* (b) shews that if the transaction be not bonâ fide, the circumstance of its being done for a valuable consideration will not alone take it out of the statute.

Cur. adv. vult.

(a) *Doug.* 89.

(b) *Cowper*, 432.

BAYLEY J. now delivered the judgment of the Court.

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There were two points in this case. One, whether there was an effectual delivery of a mortgage deed, under which the lessor of the plaintiff claimed, so as to make the mortgage operate. The other, whether such mortgage was or was not void against creditors or a subsequent mortgagee. Upon the first point the facts were shortly these. In *July 1814* Mr. *Wynne*, an attorney, who was seised in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (*Wynne*) had misapplied above 10,000*l.* of his (*Garnons'*) money. *Garnons* answered, he relied and expected that *Wynne* would provide him securities for his money; and *Wynne* said he would make him perfectly secure, and he should be no loser. On the 12th of *April 1820* *Wynne* went to his sister's, who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece, and used the words: "I deliver this as my act and deed." The niece, by his desire, attested the execution, and then Mr. *Wynne* took it away. The niece knew not what the deed was, nor was Mr. *Garnons'* name mentioned. In the same month of *April* he delivered a brown paper parcel to his sister, saying, "Here, *Bess*, keep this; it belongs to Mr. *Garnons*." He came for it again in a few days, and she gave it him; and he returned it on the 14th, 15th, or 16th of *April*, saying, "Here, put this by." It was then less in bulk than before, and contained the mortgage in question. Mr. *Wynne* died the 10th of *August* following, and after his death the parcel was opened, and the mortgage found. Mr. *Garnons* knew nothing of the mortgage until after it was so found. My Brother *Garrow*, who tried the cause, left two ques-
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tions to the jury; one, whether the mortgage was duly executed; the other, whether the delivery to the sister was a good delivery; and he explained to them, that if the delivery was a departing with the possession, and of the power and control over the deed for the benefit of Mr. *Garnons*, in order that it might be delivered to him either in Mr. *Wynne's* lifetime, or after his death, the delivery would be good; but if it was delivered to the sister for safe custody only for Mr. *Wynne*, and to be subject to his future control and disposition, it was not a good delivery, and they ought to find for the defendant. The jury found for the plaintiff. Their opinion, therefore, was, that Mr. *Wynne* parted with the possession and all power and control over the deed, and that the sister held it for Mr. *Garnons*, free from the control and disposition of the brother. It was urged upon the argument, that there was no evidence to warrant this finding; and that the conclusion which the jury drew had no premises upon which it can be supported. Is this objection, however, valid? Why did Mr. *Wynne* part with the possession to his sister, except to put it out of his own control? Why did he say when he delivered the first parcel, "it belongs to Mr. *Garnons*," if he did not mean her to understand, that it was to be held for Mr. *Garnons'* use? And though the sister did return it to her brother when he asked for it, would she not have been justified had she refused? Might she not have said, "You told me it belonged to Mr. *Garnons*, and I will part with it to no one but with his concurrence." The finding, therefore, of the jury, if this be a material point, appears to me well warranted by the evidence, and then there will be two questions upon the first point: one, whether when a deed is duly signed and sealed, and formally delivered with apt words of delivery, but
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is retained by the party executing it, that retention will obstruct the operation of the deed; the other, whether if delivery from such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and controul of the party who executed it, though such third person does not pass the deed to the person who is to be benefited by it, until after the death of the party by whom it was executed. Upon the first question, whether a deed will operate as a deed though it is never parted with by the person who executed it, there are many authorities to shew that it will. In *Barlow v. Heneage* (a), *George Heneage* executed a deed purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, and gave bond to the same trustees conditioned to pay to them 1000*l.* at a certain day, in trust for his daughters; but he kept both deed and bond in his own power, and received the profits of the estate till he died: he noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly. It was urged, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only. Lord Keeper *Wright* said, *these were the father's deeds*, and he could not derogate from them; and the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only; but that decree was, that interest should be paid upon the bond from the time when the condition made the

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(a) *Proc. Cha.* 211.

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money payable. In *Clavering v. Clavering* (a), Sir James Clavering settled an estate upon one son in 1684, and in 1690 made a settlement of the same estate upon another son: he never delivered out or published the settlement of 1684, but had it in his own power, and it was found after his death amongst his waste papers. (b) A bill was filed under the settlement of 1690, for relief against the settlement of 1684; but Lord Keeper Wright held, the relief could not be granted, and observed, that though the settlement of 1684 was always in the custody or power of Sir James, that did not give him a power to resume the estate, and he dismissed the bill. In *Lady Hudson's* case, cited by Lord Keeper Wright, a father, being displeased with his son, executed a deed giving his wife 100*l.* per annum in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, cancelled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord Somers dismissed the bill. In *Naldred v. Gilham* (c), Mrs. Naldred in 1707 executed a deed, by which she covenanted to stand seised to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement; a copy of this deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish this copy, and to have the second settlement delivered up; and Sir Joseph Jekyl determined, with great clearness, for the plaintiff, and granted a perpetual

(a) *Prec. Chn.* 235. 2 *Vern.* 475. 1 *Bro. Parl. Cas.* 122.

(b) See 2 *Vern.* 474, 475.

(c) 1 *Pr. Wms.* 577.

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injunction against the defendant, who claimed under the second settlement. It is true, Lord Chancellor *Parker* reversed this decree; but it was not on the ground that the deed was not well executed, or that it was not binding because Mrs. *Naldred* had kept it in her possession, but because it was plain that she intended to keep *the estate* in her own power; that she designed that there should have been a *power of revocation in the settlement*; that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon, by the deed's being made an *absolute conveyance*, which was unreasonable, when it ought to have had a power of revocation, and because the plaintiff, if he had any title, had a title *at law*, and had, therefore, no business in a court of equity. Lord *Parker's* decision, therefore, is consistent with the position that a deed, *in general*, may be valid, though it remains under the control of the party who executes it, not at variance with it; and so it is clearly considered in *Boughton v. Boughton*. (a) In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. Lord *Hardwicke* considered it as valid, and acted upon it; and he distinguished it from *Naldred v. Gilham*, which he said was not applicable to every case, but depended upon particular circumstances; and he described Lord *Macclesfield* as having stated, as the ground of his decree, that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking, (or rather of reserving a

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(a) 1 *Atkyns*, 625.

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power to revoke). Upon these authorities, it seems to me, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to shew he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on *Doe v. Roberts* (a), because there the brother who executed the deed, though he retained the title deeds, parted with the deed which he executed.

But if this point were doubtful, can there be any question but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit (b); and there is the strongest ground here for presuming Mr. Garnons' assent, because of his declaration that he relied and expected Mr. Wynne would provide him security for his money, and Wynne had given an answer importing that he would. *Shepherd*, who is particularly strict in requiring that the deed should pass from the possession of the grantor, (and more strict than the cases I have stated imply to be necessary,) lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger for his use and on his behalf. (c) And 2 *Roll. Abr.* (K.) 24. pl. 7., *Taw v. Bury* (d), and *Alford v. Lea* (e), and 3 Co. 27., are clear authorities, that, on a delivery to a stranger for the

(a) 2 *Barn. & A.* 367.(b) 11 *East*, 623. per Lord *Ellenborough*.(c) *Shep.* 57.(d) *Dyer*, 167 b. 1 *Anders.* 4.(e) 2 *Leon*, 111. *Cro. Eliz.* 54.

use and on the behalf of the grantee, the deed will operate instant, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in *Rolle's Abridgment* is this: "If a man make an obligation to *I.*, and deliver it to *B.*, if *I.* get the obligation, he shall have action upon it, for it shall be intended that *B.* took the deed for him as his servant, 3 *H. 6.* 27." The point is put arguendo by *Paston*, Serjt. in 3 *H. 6.* who adds, "for a servant may do what is for his master's advantage, what is to his disadvantage not." In *Tow v. Bury* an executor sued upon a bond: the defendant pleaded, that he caused the bond to be written and sealed, and delivered it to *Calmady* to deliver to the testator as defendant's deed; that *Calmady* offered to deliver it to testator as defendant's deed, and the testator refused to accept it as such; wherefore *Calmady* left it with testator as a schedule, and not as defendant's deed, and so non est factum. On demurrer on this and another ground, Sir *Henry Brown* and *Dyer*, Justices, held, that, first by the delivery of it to *Calmady*, without speaking of it as the defendant's deed, the deed was good, and was in law the deed of defendant before any delivery over to the testator, and then testator's refusal could not undo it as defendant's deed from the beginning, and they gave judgment for the plaintiff, very much against the opinion of the Chief Justice Sir *Anthony Brown*, but others of the King's Bench, says *Dyer*, agreed to that judgment. It was afterwards reversed, however, for a discontinuance in the pleadings. Sir *A. Brown's* doubt might possibly be grounded on this, that the delivery to *Calmady* was conditional, if the testator would accept it; and if so, it would not invalidate the position, which alone is material here, that an unconditional delivery to a stranger

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for the benefit of the grantee will enure immediately to the benefit of the grantee, and will make the deed a perfect deed, without any concurrence by the grantee. And this is further proved by *Alford v. Lea*. (a) That was debt upon an arbitration bond; the award directed, that before the feast of *Saint Peter* both parties should release to each other all actions. Defendant executed a release on the eve of the feast, and delivered it to *Prim* to the use of the plaintiff, but the plaintiff did not know of it until after the feast, and then he disagreed to it, and whether this was a performance of the condition was the question. It was urged that it was not, for the release took no effect till agreement of the releasee. It was answered, it was immediately a release, and defendant could not plead non est factum, or countermand it, and plaintiff might agree to it when he pleased. And it was adjudged to be a good performance of the condition, no place being appointed for delivering it, and the defendant might not be able to find the plaintiff, and they relied on *Taw's* case. This, therefore, was a confirmation, at a distance of twenty-eight years, of *Taw v. Bury*; and at a still later period (33 *Eliz.*), it was again confirmed in the great case of *Bulter v. Baker*. (b) Lord Coke explains this point very satisfactorily. "If *A.* make an obligation to *B.*, and deliver it to *C.* to the use of *B.*, this is the deed of *A.* presently. But if *C.* offer it to *B.*, there *B.* may refuse it in pais, and thereby the obligation will lose its force; (but, perhaps, in such case, *A.* in an action brought on this obligation cannot plead non est factum, because it was once his deed,) and therewith agrees *Hil. 1 Eliz. Taw's* case. (c) The

(a) 2 *Leon*, 110. *Cro. Eliz.* 54.

(b) 5 *Co.* 26 b.

(c) *S. P. Bro. Ab. Donec*, pl. 29. 8 *Vin.* 488.

same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal in pais, and by that the property and interest will be divested, and such disagreement need not be in a court of record. Note, reader, by this resolution you will not be led into error by certain opinions delivered by the way and without premeditation, in 7 *Ed. 4.* 7. &c. and other books obiter." (a) Upon these authorities we are of opinion that the delivery of this deed by *Wynne*, and putting it into the possession of his sister, made it a good and valid deed at least from the time it was put into the sister's possession.

The remaining question then is this, whether this deed is void as against creditors under the 13 *Eliz. c. 5.*, or as against defendant as a purchaser under 27 *Eliz. c. 4.*? As to creditors, there was no proof of outstanding debts at the time of the trial, nor any proof of there being any creditor except the defendant, and he may be considered in the double character of creditor and purchaser. The facts in evidence as to him are merely these: that in *May* or *June* 1820, Mr. *Wynne* delivered to his son a bond and mortgage for defendant and title deeds, and the mortgage and title deeds related to the same premises as Mr. *Garnons'* mortgage. What was the nature of the defendant's debt did not appear, or what was the consideration for the bond and mortgage. Whether any money was advanced when such bond and mortgage was given, or whether it was for a pre-existing debt, whether it was obtained by pressure from the defendant, or given voluntarily and of his own motion by Mr. *Wynne*, and whether the defendant knew of it or not, are points upon which there was no proof, and under these

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(a) *Gould J.* cites this doctrine, *Salk.* 301. in *Wankford v. Wankford.*

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circumstances we cannot say the defendant made out a case to entitle him to treat Mr. *Garnons'* deed as void under either of the statutes of *Elizabeth*. Should he be able hereafter to shew that his mortgage is entitled to a preference, the present verdict will be no bar to his claim. For these reasons we are of opinion that the rule for a new trial must be discharged.

Rule discharged.

Tuesday,
June 6th.

RUNCORN against DOE, on the Demise of
J. COOPER (in Error).

Where in ejectment the plaintiff gave evidence of some acts of ownership exercised upon the land in dispute, by the lessor's ancestor, and of a fine levied by him about the same time; and the defendant proved some acts of ownership by the vicar, and gave evidence which tended to shew that the land was formerly part of the church-yard; the Judge refused to leave it as a question to the jury, whether the parties to the fine had any estate of freehold, but told them that the fine was a conclusive bar to the vicar. On error, held, that this was wrong, and the judgment was reversed.

An adverse possession for twenty years, is not a bar to a rector or vicar, except as against the same incumbent who submitted to such possession,

EJECTMENT for messuages and land in the parish of *Runcorn*, in the county of *Chester*. Plea, not guilty. At the trial before *Warren C. J.* of *Chester*, at the Great Sessions for that county, in the Summer 1823, it appeared that the premises in question consisted of a piece of land lying on the south side of the river *Mersey*, at a place where the tide flows and reflows, extending from the north side of *Runcorn* church-yard down to low water mark, and upon which some baths had been built. The lessor of the plaintiff proved, that, in 1792, his ancestor (one *J. Cooper*) had the land lying both to the east and the west of *Runcorn* church-yard; that his cattle used to go down to the sea-shore, and depasture on the banks and upon the place in question, as well as other parts. There was no fence to divide it from the adjoining parts of the shore. Some other acts of ownership on his part were also proved. The

plaintiff

plaintiff then gave in evidence the chirograph of a fine levied by *J. Cooper* in 1797, and a deed to lead the uses of the fine, which declared that it should enure to such uses as *J. Cooper* should appoint; and, in default of appointment, to him and his heirs for ever. For the defendant, evidence was given to show that the river had made encroachments upon the shore opposite *Runcorn* church, and that the locus in quo had formerly been part of the church-yard, and that acts of ownership were exercised by the vicar for several years about 1780. About that time two bathing sheds were built there by permission of the town of *Runcorn*; they remained fifteen years, and were then washed away by a high tide. The new baths were built in 1822, by subscription of several of the inhabitants of *Runcorn*. The Chief Justice having summed up the evidence so given to the jury, the foreman asked, "If the jury should be of opinion that the freehold of the place sought to be recovered in the action was in the vicar of *Runcorn*, what effect the fine would have in point of law?" And thereupon the counsel for the defendant insisted, that it ought to be left as a question for the jury whether the parties levying the fine had, at the time of the levying thereof, any estate of freehold by right or wrong in the said place; but the justices (*Warren C. J.* and *Marshall J.*) refused to leave such question to the jury, and delivered their opinion to the jury that, in point of law, the fine was a conclusive bar to the vicar. And the said justices, at the request of the counsel for the plaintiff, asked the jury whether *J. Cooper* (the lessor of the plaintiff) had since been twenty years in possession of the said place. And the jurors thereupon said they were of opinion that he had been, and that they were of opinion that the right to the said place was in the vicar

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the time of the levying the said fine. And thereupon, by the direction of the said justices, the jury found a verdict for the plaintiff. A bill of exceptions was then tendered and sealed; and the record having been removed into this court by writ of error, the following errors were assigned, viz. that the justices delivered their opinion that the fine was a conclusive bar to the vicar, whereas it was not so; and that they refused to leave to the jury the question whether the parties levying the fine had at the time of levying it, any estate of freehold by right or by wrong in the said place. Joinder in error.

Parke for the plaintiff in error. There can be no doubt that the direction of the justices below was wrong. There was contradictory evidence as to the possession of the place in dispute. Then the lessor of the plaintiff sought to bind the right by giving in evidence a fine levied without proclamations, at least none were proved. That fine would be void if the parties to it had not an estate of freehold. Now, where a fine is pleaded, it may be answered by saying, that the parties had no estate of freehold; and here the whole being at large upon the evidence, it was a question for the jury whether they had any such estate or no. It appears that the counsel for the plaintiff endeavoured to get rid of the mistake, by requesting the justices to ask the jury, whether the lessor had since been twenty years in possession; and they answered that he had. Now, in the first place, the Court cannot take notice of a question so put to the jury. They have not found a special verdict, but generally for the plaintiff, and the justices never desired the jury to dismiss the question of the fine in giving their verdict. Secondly, supposing the Court would
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take notice of this answer, it does not shew that the plaintiff is entitled to recover. The jury do not say it was an adverse possession, nor that it was continuous; they do not say when it began, or when it ended. The demise was laid in 1822; the trial was in 1823. Possibly the jury might not mean to say that the twenty years had expired at the time of the demise, but at the time of the trial. They find nothing as to the state of the church, whether there had been a change of the incumbent during that period; and as against the church, twenty years' possession gives no title.

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Cross Serjt. contrà. The question is, whether, taking the whole case into consideration, there was any misdirection. It appeared upon the evidence, that the ancestor of the lessor of the plaintiff was in possession of the place in question in the year 1792, five years before the fine was levied. *Primâ facie*, possession proves a seisin of an estate of freehold, at least. In this case there was nothing to destroy the effect of that possession; the justices were therefore warranted in assuming that the parties to the fine had an estate of freehold, and then it would be a conclusive bar. [*Abbott C. J.* The old bathing sheds stood for fifteen years, and were washed away twenty-one years ago; they must, therefore, have been in existence at the time when the fine was levied.] There was no evidence that they were put up adversely to the ancestor of the lessor. But supposing the direction as to the fine to be incorrect, still the plaintiff was entitled to recover, the jury having found a possession in him for twenty years. In *Bull, N. P.* 103. it is laid down, "If the plaintiff prove that *A.* was in the possession of the premises in question, and that

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that his lessor is heir to *A.*, it is sufficient *prima facie*; for it shall be intended that *A.* had seisin in fee till the contrary appear. And if he prove that his lessor or his ancestors had possession for twenty years without interruption, till the defendant obtain possession it is a sufficient title; for by the 21 *Jac.* 1. c. 16. twenty years' possession tolls the entry of the person having right; and, consequently, though the very right be in the defendant, yet he cannot justify ejecting the plaintiff."

ABBOTT C. J. I am of opinion, that the judgment given in the Court below must be reversed, and a venire *de novo* awarded. The question before us is not upon what the jury might have found, but whether the direction of the learned judge, that the fine was a conclusive bar to the vicar, was right. It could not be so unless the possession of *J. Cooper*, who levied it, existed at that time. Upon the whole of the evidence, it is very doubtful whether it was in him or not. Then a question was put to the jury, to which they answered, that the lessor of the plaintiff had been in possession twenty years since the fine, but that they were of opinion, that at the time when the fine was levied, the right was in the vicar; and thereupon, by the direction of the justices, a verdict was found for the plaintiff. Even supposing the fact of the twenty years' possession, to have been found with all that precision, the want of which has been pointed out by the counsel for the plaintiff in error, it would be difficult to say that it remedied the direction of the learned judge as to the other matter. But that finding was very loose, and accompanied by the observation as to the right of the vicar. Now, possession is not, in general, evidence against a rector or vicar,

vicar, unless against the same person who has submitted to that possession (a), and it does not appear in this case, whether, during the period in question, the incumbent of Runcorn has or has not been changed. It is said, that there was no evidence to shew that the land in question was ever the property of any person but the lessor of the plaintiff, and his ancestors. But the church-yard intervened between the different parts of their property lying above the shore, and there was considerable evidence to shew, that the place in question was formerly part of the church-yard. For these reasons, I am of opinion that, upon the whole finding, enough does not appear to sustain the judgment for the plaintiff below.

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BAYLEY J. I am of the same opinion. A fine is by the common law conclusive upon parties and privies, but not upon strangers, unless it be with proclamations. In the present case, no proclamations were proved to have been made. But even if they had, the fine would not be binding, unless the party levying it had at the time an estate of freehold by right or by wrong. Upon the evidence, I think that the justices below were not warranted in assuming that the ancestor of the lessor of the plaintiff had any estate of freehold. (The learned judge then commented upon the evidence to shew, that some time before the fine the freehold was not in *J. Cooper*, but in the vicar.) If it was in the vicar, *J. Cooper* could not afterwards obtain the freehold by right, for the vicar had no power to alien. Then, with respect to the finding of the twenty years' possession, in order to make that

(a) See *Croft v. Howel*, *Plowd.* 558. and the note by *Plowd.* in *Stowel v. Zouch*, *Ibid.* 375. *Barker v. Richardson*, 4 B. & A. 579.

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availing, the finding should have been in precise and definite language. But the jury do not say whether it was adverse or not, nor do they say when the twenty years expired. That finding cannot, therefore, be made use of to support the judgment in favour of the plaintiff below.

HOLROYD and LITLEDALÉ Js. concurred.

Judgment reversed, and venire de novo awarded.

Thursday,
June 8th.

The KING *against* LACY, Clerk.

Where an inclosure act directed that all great tithes payable to the rector of the parish, should be extinguished, and that the commissioners should ascertain the *net value* of such tithes, and affix a *fair clear annual rent* or sum of money per acre in lieu of such tithes, and as an adequate compensation for the same to the rector: Held, that the rector was in respect of such rents, rateable to the repair of the highways.

UPON an appeal by the Rev. *Richard Lacy*, rector of the parish of *Whiston*, against an order made by a magistrate for the payment of the sum of 12*l.* 5*s.*, being the amount of an highway assessment upon him for the township of *Whiston*; the sessions confirmed the order, subject to opinion of this Court upon the following case. In the 56 G. 3. an act was passed, intituled an act for inclosing lands in the parish of *Whiston*, in the county of *York*, in which act is the following clause: "And whereas it is convenient and desirable that all and singular the great tithes rendered or payable in kind or otherwise, and all ecclesiastical dues, moduses, compositions, or other payments in money or prescriptive rights whatsoever in lieu thereof which can or may henceforth arise or grow due or payable to the said *Richard Lacy* and his successors, rectors of the parish of *Whiston* aforesaid, for the time being, out of or from or for and in respect as well of the said several commons and parcels of waste ground by this act directed

directed to be divided, allotted, and enclosed, as of the several and respective messuages, cottages, tofts, garths, gardens, orchards, and ancient inclosed lands and grounds, and other hereditaments situate, lying, and being within the said parish, shall be abolished and extinguished, and that in lieu thereof within so much of the said parish as lies within the said manor of *Whiston*, an adequate compensation should be made to the said *Richard Lacy* and his successors, rectors of the parish of *Whiston* aforesaid, for the time being, by a corn rent or rents, as hereinafter is mentioned, and that in lieu thereof, within so much of the said parish as lies within the said manor of *Morthen*, an adequate compensation should be made to the said *Richard Lacy* and his successors, by an allotment or allotments of land as hereinafter also mentioned: Be it therefore enacted, that the said commissioners shall, and they are hereby required to ascertain the net value of all great tithes and moduses issuing or that may arise and renew from out of, in, or upon so much of the said commons and ancient inclosures of the said parish as lie within the said manor of *Whiston*, with respect to each owner's or proprietor's share thereof, and to affix a fair clear annual rent or sum of money per acre in lieu of such great tithes and moduses, and as an adequate compensation and satisfaction for the same, to the said *Richard Lacy* and his successors, rectors of *Whiston* aforesaid; and shall in and by their award hereinafter directed to be made, ascertain and distinctly set forth against the name of each owner of common allotment and ancient inclosures, at the time of making such their award, the exact measurement of each field or inclosure constituting his, her, or their property within the manor of *Whiston* aforesaid, and the
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annual rents or sums of money per acre to be hereafter issuing from each field or inclosure respectively, in lieu of all great tithes and moduses as aforesaid; which said rents and sums of money shall be payable and paid for ever by the several owners or occupiers thereof by four equal quarterly payments in every year; that is to say, the 12th day of *February*, the 12th day of *May*, the 12th day of *August*, and the 12th day of *November*, the first payment thereof to begin and be made on the 12th day of *February* in such year as the said commissioners in their award shall order or direct." The rector was to have an allotment in lieu of small tithes. In the year 1825 the Rev. *R. Lacy* was rated for the repairs of the highways in the township of *Whiston*, at the sum of 12*l.* 5*s.* in respect of the corn rents given to him in lieu of tithes. This he refused to pay, and upon such refusal the order appealed against was made.

Tindal in support of the order of sessions. The corn rent in this case was rateable to the repair of the highways. By the 13 *G. 3. c. 78. s. 45.* the assessments are to be made "upon every occupier of lands, tenements, woods, *tithes*, and hereditaments within the parish, township, or place," and the only substantial question is, whether the corn rent be by substitution tithe? It is given in lieu of the great tithes, payable in kind or otherwise, and all ecclesiastical dues, moduses, compositions, or other payments. Unless there are some words expressly exempting it, this rent will be liable to all burthens to which the tithes were liable, *Lowndes v. Horne* (a), *Rex v. Boldero*. (b) In *Rex v. Toms* (c), and

(a) 2 *W. Bl.* 1252.(b) 4 *B. & C.* 467.(c) *Doug.* 401.

Chatfield v. Ruston (a), an express exemption from all rates and taxes was given. Perhaps the expression *net value* in the inclosure act may be relied upon; but that only means the value of the tithe, minus the expence of collecting it. It would be impossible to make an estimate of the poor and highway rates, which are fluctuating charges, so as to ascertain the net value after allowing for those rates.

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Blackburne, contra. A corn rent, such as that now in question, is not rateable to the repair of the highways under the 13 G. 3. c. 78. Secondly, this rent is expressly exempted from any such charge by the act for enclosing lands in the parish of *Whiston*. No analogy exists between poor rates and highway rates, and, therefore, no legitimate inference can be drawn in favor of the present rate from the cases which have been decided upon the 43 Eliz. c. 2. That statute makes rectors and vicars liable to be rated *eo nomine*, and there was good reason for such a provision. In early times, when there was no legal provision for the poor, parsons were under a spiritual obligation to relieve them out of the profits of their livings, and, therefore, it was to be expected that the statute would make them liable to be rated for the profits of their benefices, in whatever way those profits were derived. The object of the highway act appears to have been to cast the burthen of repairing roads upon those who used them, and accordingly we find that statute-work is to be done or compounded for in proportion to the value of the lands in the occupation of the party charged, or the number of teams kept by him. This

(a) 3 B. & C. 865.

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difference between the two statutes was pointed out by this Court in *Rex v. Justices of Buckinghamshire* (a), where they refused to compel the justices to enforce by a distress warrant the payment of a highway rate made upon a parson in respect of tithes which he had let. And in *Underhill v. Ellicombe* (b) the Court of Exchequer seem to have thought a parson not liable to be rated under such circumstances. Secondly, the inclosure act expressly exempts this rent from highway and all other rates. This exemption does not depend merely upon the provision that the commissioners shall calculate the rent upon the *net value* of the great tithes, &c., although that expression would very fairly admit of the construction now contended for; but the statute goes on to say, that they shall affix a fair *clear annual rent* or sum of money in lieu of such tithes, &c. Now a rent cannot be *clear* which is subject to rates, and, therefore, full effect will not be given to the words of the statute, unless the order of sessions is quashed.

Cur. adv. vult.

BAYLEY J. delivered the judgment of the Court.

The question in this case was, whether certain corn rents payable under an inclosure act, in lieu of tithes and moduses, in the township of *Whiston*, were liable to be assessed to the highway rate. Two points were insisted upon in opposition to the rate; one that the inclosure act virtually exempted them, because it fixed the rents according to the net value of tithes and moduses, and it was insisted that by net value was to be understood the value *free from rates*; the other, that

(a) 1 B. & C. 485.

(b) 1 M'Lellan & Younge, 450.

ordinary

ordinary tithes, i. e. tithes not being impropriate or appropriations of tithes, were not in any case liable to the highway rate, and that the corn rents which were payable in lieu of such tithes were, therefore, also free. Since the case of *Rex v. Boldero* (a), it must be considered as settled that, upon the second point, the corn rents would stand upon the footing of tithes and moduses for which they were substituted, and that if the tithes and moduses would have been liable, the corn rents, unless specially exempt by the inclosure act, are liable. Are the corn rents, then, specially exempt by the inclosure act? The parish of *Whiston* contains two manors, the manor of *Whiston*, and the manor of *Morthen*, and the act applies to both. I collect from the case that part of the parish constitutes a distinct township, the township of *Whiston*, and it is to that township only the rate applies. The act directs that the rector, who is rector of *the parish*, shall have, out of the wastes in both manors, an allotment equivalent in value to all the small tithes and payments in lieu of small tithes within the said manors, regard being had to the amount of the small tithes payable out of the old inclosures and commons within each of the manors respectively. No provision is made for exempting that allotment from parochial rates, and it would, therefore, of course be liable to contribute to them. The statute then makes a provision in lieu of great tithes, and directs that compensation shall be made for what arises in *Whiston* manor by corn rents, and for what arises in *Morthen* manor by an allotment; but there is no clause to exempt the allotment from its proportion of parochial burthens, and of course

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(a) 4 B. & C. 467.

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it would be liable. The commissioners are directed to ascertain the net value of all great tithes and moduses in *Whiston*, with respect to each owner's share thereof, and to affix a fair clear annual rent per acre in lieu of such great tithes and moduses; and the question is, what is here meant by the net value of the great tithes and moduses. If by *net* is meant, not only allowing for the expences of collecting and getting in, but deducting also all parochial burthens thereon, the rents are exempt; but if the word "*net*" refers only to the expences of collecting and getting in, the act leaves them liable to the parochial burthens they would otherwise have to bear; and it seems to us it refers to the expences of collecting and getting in only. Those expences may easily be computed: they will seldom vary except as the price of labour and the accidents of each season vary; but the parochial burthens may vary in a much greater degree; and had it been intended to exempt the rector from contributing to them in respect of the corn rent, it can hardly be supposed he would have been left liable in respect of his allotments. The probability is, he would have been wholly exempted, or wholly liable.

Then is the highway act confined to tithes improper, and propriations of tithes? By the highway act 13 G. 3. c. 78. s. 45. the assessment is to be made upon every occupier of *lands, tenements, woods, tithes, and hereditaments* within the parish; language very different from what is used in 43 Eliz. c. 2. for the poor rate. The assessment there is to be made upon every inhabitant, parson, and vicar, and every other occupier of lands, houses, *tithes improper, propriations of tithes*, coal-mines, or saleable underwoods. The reason of

specifying tithes impropriate and propiations of tithes *there* might be, because every other description of tithe, all in the hands of the incumbent, would come into charge under the words *parson and vicar*, and the particular descriptions of tithes might be added to take in what might be in *lay* hands, and would not be reached by the words “parson or vicar;” and the legislature might studiously have it in view to include every description of tithes, in whatever hands it might be. And in the highway act, where the legislature has used the general word *tithes*, it must extend to every description of tithes, unless a clear intention to confine it can be collected from the act. We can find no such intention, and are therefore of opinion that these corn rents, which are in substance tithe, are liable to the rate.

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Order of sessions confirmed.

GOODTITLE on the Demise of DODWELL *against* SATURDAY,
GIBBS. JUNE 10th.

EJECTMENT for lands in the parish of *White Waltham*, in the county of *Berks*. Plea, the general issue. At the trial before *Burrough J.*, at the *Berkshire* Summer assizes, 1825, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case: *Martha Hatton* in her lifetime, and at the time of the making of the surrender to the use of her By lease and release *M. H.* conveyed to *J. W.*, and to his heirs and assigns, certain freehold and copyhold premises, to hold the same unto the said *J. W.*, his heirs and assigns, from and immediately after the death of *M. H.*, to, for, and upon the several uses, ends, intents, and purposes thereafter mentioned: Held, that, by the premises, an immediate estate of freehold was given to *J. W.*, and that the habendum had not the effect of rendering the deed void as giving a freehold in futuro.

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will, and making such will and executing the deeds hereafter mentioned, was seised of estates of inheritance in fee simple in the premises in question, consisting of a messuage and buildings, and about five acres and a half of freehold land, and three closes of land which are copyhold, situate as aforesaid, and being so seised, she on the 9th of *February* 1763, surrendered the said copyhold premises to and for such uses, intents, and purposes, and to and for the benefit of such person and persons, and his, her, and their heirs, as the said *Martha Hatton* by her last will and testament in writing already had or at any time thereafter should limit, direct, appoint, or give the same. *Martha Hatton* duly executed a lease and release of the said freehold premises as follows: The lease without date, and the release bearing date the 29th day of *July* 1768, and made between *Martha Hatton* of the one part, and *John Westbrook* the elder of the other part, and by the latter indenture it was witnessed, that for the settling and assuring the messuages or tenements, lands, hereditaments, and premises thereafter mentioned, to and for the several uses, intents, and purposes therein after particularly mentioned, the said *Martha Hatton* for and in consideration of the sum of ten shillings, &c. paid by the said *John Westbrook* the elder, the receipt whereof was thereby acknowledged, and for other causes and considerations thereunto moving, did grant, bargain, sell, alien, release, and confirm unto the said *John Westbrook* the elder, (in his actual possession then being by virtue of a bargain and sale to him thereof made for one whole year, by indenture bearing date the day next before the day of the date of the indenture of release, and by force of the statute made for trans-

transferring uses into possession,) and to his heirs and assigns, divers hereditaments, including by description the freehold and copyhold premises in question, to hold the same unto the said *John Westbrook* the elder, his heirs and assigns, from and immediately after the decease of the said *Martha Hatton*, to, for, and upon the several uses, ends, intents, and purposes thereafter mentioned, expressed, and declared of and concerning the same; that is to say, to the use of the said *John Westbrook* the elder (from and immediately after the decease of the said *Martha Hatton*) and *Anna* his wife, and their assigns for and during the term of their natural lives, and the life of the longer liver of them; and from and after the decease of the survivor of them the said *John Westbrook* the elder and *Anna* his wife, to the use and behoof of *John Westbrook* the younger, son of the said *John Westbrook* the elder, and his assigns, for and during the term of his natural life, without impeachment of waste, and from and after the decease of the said *John Westbrook* the younger, to the use and behoof of the first and other sons of the body of the said *John Westbrook* the younger, lawfully to be begotten severally and successively, and the heirs male of the body of such first and other sons lawfully issuing; and for want of such issue, to the use and behoof of *Hatton*, the daughter of the said *John Westbrook* the elder, and *Anna* his wife, her heirs and assigns for ever. And the said *Martha Hatton* covenanted for further assurance of the said freehold and copyhold premises to the uses aforesaid, but no surrender was made of the copyhold lands to the uses aforesaid. The lessor of the plaintiff was the daughter of *Hatton* (the daughter of *John Westbrook* and *Anna* his wife,) by *Henry Dodwell*, her husband.

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John Westbrook the elder and *John Westbrook* the younger suffered a recovery in 1774; but it was admitted that it did not bar the remainder given to *Hatton Westbrook* by the release of 1768, the only question raised being as to the validity of that deed. The case was argued on a former day in this term by

Coot for the lessor of the plaintiff. The question turns upon the habendum in the deed bearing date the 29th of *July* 1768. It is contended, that the habendum gave an estate of freehold in futuro, and is therefore void. In the granting part, the estate given to *J. W.* the elder is express and certain; it is to him, his heirs, and assigns; then follows the habendum, "to hold the same unto the said *J. W.* the elder, his heirs and assigns, from and immediately after the decease of the said *Martha Hatton*, to, for, and upon the several uses, ends, intents, and purposes hereinafter mentioned," &c. Now the habendum may very fairly be read with a stop after the words "heirs and assigns." If so, the grant would be immediate, although certain uses might arise in futuro. But an habendum is not an essential part of a deed (a), and if it is repugnant to the granting part, it must be rejected. There are, indeed, cases apparently warranting a different conclusion; but upon examination it will be found that they are distinguishable from the present case. The rule is this; if an estate be granted in any premises, and that grant is express and certain, the habendum shall not vitiate it, for utile per inutile non vitiatur. But if the estate granted in the

(a) *Shep. Touch.* 76.

premises

premises be not express, but arising by implication of law, there a void habendum, or one differing materially from the grant, may defeat it, *Shep. Touch.* 112. *Baldwin's case* (a), *Stukeley v. Butler* (b), and *Carter v. Madgwick* (c), which last case is expressly in point for the present lessor of the plaintiff. It is true that in *Buckler's case* (d), where tenant for life having made a lease for years, granted tenementa prædicta to C. habendum, from the feast of the *Nativity of Saint John the Baptist* next following, for life, the grant was held void, for that an estate of freehold cannot commence in futuro. But there it was observed, that the habendum was not contrary to the premises, for no certain estate was contained in the premises, but generally the land given and granted, which might be qualified by the habendum to an estate for years or at will. And in *Hogg v. Cross* (e), where an habendum for an estate of freehold in futuro was held to make the grant void, the Court proceeded upon the ground that it was the purport of the deed that nothing should pass till after the death of the grantor, and that nothing should pass but according to the intent; which rule has been adopted in many modern cases, *Roe v. Tranmer* (f), *Osmond v. Sheafè* (g). In *Underhay v. Underhay* (h), one having leased his land to three for their lives, granted the reversion habendum to the grantee for his life, and then added, "which said estate for life is to begin after the death of the three first lessees," and that was adjudged a good estate in reversion for life. Thus then it appears that there is no

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(a) 2 Co. 25.

(b) Hob. 168.

(c) 3 Lev. 339.

(d) 2 Co. 55.

(e) Cro. Eliz. 254.

(f) 2 Wills. 75.

(g) 3 Lev. 370.

(h) Cited in Hob. 171. Cro. Eliz. 269. & C.

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objection to the granting part of this deed by the common law; secondly, there is no objection to the limitation of uses. The greatest effect produced by the statute of uses is, that by its operation the legal estate of freehold passes in futuro; for there is no doubt that a limitation by way of springing use is good provided the event whereupon the use is to arise is to happen within what the law considers a reasonable time; that is, a life or lives in being and twenty-one years after, which appears to have been the case in *Davis v. Speed* (a), *Roe v. Tranmer*, *Osman v. Sheafe*, and *Pybus v. Mitford* (b).

Preston contra. If the objection that the conveyance is of a freehold in futuro, and therefore void, be well founded, the uses cannot arise, debile fundamentum fallit opus. In all the cases which have been cited, it

was held, that the conveyance operated as a covenant to stand seised. The only case in point cited for the plaintiff was *Carter v. Madgwick*; but that is not found in any other reporter but *Levinz*, although nearly all the other cases in that book are: it does not appear to have been ever quoted or relied upon by any Judge, and is contrary to every principle of law, and every rule applied to the exposition of deeds (c). The case was thus: "*Parker* seised in fee, by indenture between him and *J. B.* his grandson, the lessor, in consideration of affection and 5s., granted, bargained, and sold to the lessor and his heirs the tenements in question, habendum, immediately after his death, to the lessor and the heirs male of his body," with divers remainders over; and the Court, by their judgment, that the estate passed

(a) 2 Salk. 676.

(b) 1 Ventr. 572.

(c) It is found in *Com. Dig.* tit. *Fait*, (E 10.)

imme-

immediately by the premises, made that a fee which was intended to be an estate tail, and made that a grant of the estate immediately which was intended to be a grant in futuro, reserving a life estate to the grantor. It might have been good as a covenant to stand seised; but the Court did not avail themselves of that doctrine, as in *Osman v. Sheafe*. The habendum certainly is not essential to a deed; but when inserted, it is most essential, unless it be absolutely repugnant to the granting part. *Stukeley v. Butler*, and the other cases in which it has been held, that if there be a grant of an express estate, followed by an habendum repugnant to that grant, the habendum is void, may be admitted; but the question has always turned upon the repugnancy. Thus where a grant is to *A.* and his heirs, habendum for the life of *A.*, that is clearly repugnant (*a*). [*Bayley J.* If the deed be read with a stop after "habendum unto *J. W.*, his heirs and assigns," then nothing is postponed but the use; the seisin is given immediately.] The deed must be read as if it had been made before the statute of uses. Putting the uses out of view, the conveyance is to *A.* and his heirs, habendum in futuro. The declaration of uses does not commence until after the habendum is closed; *Braine v. Deakon*. (*b*) It is admitted, that the habendum may control the grant where the estate is not express; it may be a grant in fee or in tail, in præsentî or in futuro, and that is to be explained by the habendum, 2 *Roll. Abr. Grant*, p. 68 (*c*). Here the estate granted is not express; it is to *A.* and his heirs; but they were in-

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(*a*) *Plowd.* 153.

(*b*) *Pres'on on Estates*, 229.

(*c*) Thus, a grant to "*A.* and his heirs" may be restrained by the habendum to the heirs of the body. *Thurman's case*, 2 *Roll. Abr. Grant*, K. pl. 24.

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tended to take in the particular mode pointed out by the habendum.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court.

This came before the Court upon a special case, which was argued during the present term. The only question raised was upon the validity of a deed executed by *Martha Hatton*, as to the freehold tenements therein mentioned. After stating the facts of the case, the Lord Chief Justice proceeded as follows :

The objection made to the validity of the deed was, that it is a grant of a freehold to commence in futuro ; and if this be its true effect, it is undoubtedly void. The question whether this be its true effect, depends upon the operation of the habendum. If the habendum is to be considered as the operating part of the deed, the deed will be an attempt to convey a freehold in futuro. If the part called the premises be the operating part, and the habendum can be rejected, or considered only as qualifying the premises, a present freehold will pass, and the deed will be good. Many cases were quoted in the argument, to which it is not necessary to advert again. The distinction as to the effect of the habendum between deeds in which the premises expressly mention an estate or interest, and those in which the premises merely describe the tenements, but do not mention any estate or interest, was noted and relied upon, and it was contended that in the deed in question the premises do mention an estate and interest, (as we think they do,) and the case of *Carter v. Madgwick* (a) was quoted as being directly in point to the present case.

(a) 5 Lev. 339.

The distinction to which I allude is this : If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law, but if an habendum follow, the intention of the parties as to the estate to be conveyed will be found in the habendum, and, consequently, no implication or presumption of law can be made, and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shewn, and the deed may be effectual without any habendum, and if an habendum follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with either, the habendum shall be rejected, and the deed stand good upon the premises.

This was done in *Carter v. Madgwick* ; and the very learned gentleman who argued for the defendant, and against the validity of the deed, observed that that case was a solitary decision, never quoted or relied upon, and contrary to law, as it gave an immediate estate to the grantee, whereas the grantor manifestly intended to reserve a life estate to himself. Perhaps so much of the opinion of the Court as regards the exclusion of a life-estate in the grantor may be found to have been expressed, without sufficiently advertent to the operation of the statute of uses, and to a construction that might have been given to the deed so as to allow a life-estate. The grantor had in fact enjoyed during life in that case as in the present. But the case of *Carter v. Madgwick* is not a solitary decision. The case of
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Jarman v. Orchard (a) is to the same effect. In that case *Thomas Nicholas* being possessed of a barn, cottage, and land, as assignee of a lease for 1000 years, did, by indenture reciting the lease, and expressed to be in consideration of natural love to his grand-daughter, and for other good causes and considerations, grant, assign, and set over to his grand-daughter *Mary, her executors, administrators, and assigns*, all the said cottage, barn, and lands, and all other the premises thereinbefore recited, together with the recited lease, and all writings and evidences touching the premises, habendum the said cottage, &c., to the said *Mary*, her executors, administrators, and assigns, from and after the decease of the said *Thomas Nicholas* and his wife, for the residue of the term, subject to the rent and covenants. Now if this deed was considered as an assignment to commence and take effect after the death of *T. Nicholas*, the deed would be void, as in law assigning nothing, the life-interest of *T. Nicholas* being deemed in law to be of greater value and longer duration than any term of years. And it was contended that the deed could only be construed as such an assignment, because it appeared that *T. N.* did not mean to part with his interest in the term during his own life. The question arose after the death of *T. N.* In the King's Bench judgment was given against the validity of the deed; but that judgment was reversed in the Exchequer Chamber, and the reversal affirmed in parliament. And the ground of the reversal was, that the entire residue of the term passed by the premises of the deed, and the habendum was void.

(a) *Skin.* 528. *Salk.* 346. *Show.* P. C. 199.

In the present case, we think an immediate freehold passed by the premises in the deed, and consequently the objection that the deed passed only a freehold to commence in futuro, cannot prevail. *Mary Hatton*, the releasor, is now dead, and therefore perhaps it may not be necessary to decide whether any use vested in her for her life. We think, however, that the use did vest in her for her life, and so the deed will stand good in all its parts, and effect be given to the intention of the parties, which ought to be done, if by law it may. The release is expressed to be made in consideration of ten shillings paid by *John Westbrook* the elder, and other causes and considerations. This *John Westbrook* had married a cousin of *Martha Hatton*, and the deed was evidently intended as a family settlement. Now if the consideration of ten shillings had not been expressed, and the deed had contained no habendum, we think the use of the entire fee would have resulted to *M. H.* by implication and presumption of law. And upon supposition of the absence of this consideration, and the insertion of the habendum, we think the effect of the habendum would be partially to rebut the implication, and to narrow the use to an estate for life in *M. H.* And if the mention of this consideration of ten shillings should have the effect of preventing a resulting use to *M. H.*, and, in the absence of an habendum, should vest the use of the entire fee in *J. W.* (a point upon which we think it unnecessary to give an opinion), still this use would only arise by implication and presumption of law, grounded on the pecuniary consideration, and would not be a use expressed in the deed. And this being so, we think the habendum might have, in this view of the case also, the effect of partially rebutting the implication, by
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shewing the intention of the parties to be, that the use should not vest in *J. W.* until after the death of *M. H.*, and this would be good in law, because a use may be limited in futuro; and then the use of so much of the estate as was not limited or declared by the deed, might in our opinion result to and vest in *M. H.* And upon either of these constructions, effect will be given to the whole deed, and to the intention of the parties.

Postea to the plaintiff.

Saturday,
June 10th.

DENN on the Demise of NOWELL *against* ROAKE
(in Error).

Where *A. B.*, seised in fee of one moiety of certain premises in the county of *S.*, and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows: "I give and devise all my freehold estates in *L.* and county of *S.*, or elsewhere, to my nephew *J. K.* for life, on condition that out of the rents thereof he do from time to time keep such estates in repair:" Held, that this did not operate as an execution of the power, and passed that moiety only of which testator was seised in fee.

EJECTMENT for a mill, dwelling-house, and land, in the county of *Surrey*. Plea, not guilty. At the trial before *Richards* C. B. at the *Surrey* Spring assizes, 1823, a special verdict was found in substance as follows. *Miles Poole* was seised in fee of the premises in question, and died so seised on the 17th of *November* 1749. Upon his death the premises descended to *Sarah*, the wife of *T. Scott*, and *Elizabeth*, the wife of *Henry Roake*, which said *Sarah* and *Elizabeth* were the daughters and co-heirs of *Miles Poole*. The said *T. Scott* and *Sarah* his wife, and *Henry Roake* and *Elizabeth* his wife, by lease and release, bearing date respectively 25th and 26th of *April* 1750, conveyed the premises to one *Hill*, to the intent that he might become a good and perfect tenant of the freehold for suffering a recovery. And it was thereby declared, that the recovery should enure as to one undivided moiety of the premises to the use of *T.*

Scott

Scott for life, without impeachment of waste; remainder to the use of *Sarah Scott* for life; remainder to the use of such person and persons, and for such estate and estates as the said *Sarah Scott*, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing; or any writing purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time direct, limit, or appoint; and for want of such appointment, to the use of all the children of *T. Scott* and *Sarah* his wife, as tenants in common in tail. And for default of such issue to the use of *Elizabeth Roake* for life, without impeachment of waste; remainder to her children as tenants in common in tail; and for default of such issue to the use of *T. Scott* in fee. And there were corresponding limitations as to the moiety of which *Henry Roake* and *Elizabeth* his wife were seised. A recovery was accordingly suffered in *Easter* term 1750. In 1758 *T. Scott* died without issue, leaving *Sarah* his wife him surviving. In 1763 *Sarah Scott* intermarried with *John Trymmer*, who died in 1766, leaving *Sarah Trymmer* him surviving. *Elizabeth Roake* died in the month of *May* 1775, leaving *Henry Roake*, her husband, and *John Roake*, her son and only child by the said *Henry Roake*, her surviving, and without having made any deed, writing, will or appointment for or in respect of the tenements in the declaration mentioned. By lease and release, bearing date respectively the 6th and 7th of *September* 1775, (the release reciting a contract be-

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tween *Sarah Trymmer* and *John Roake* for the absolute purchase of his moiety of the premises, subject to the life-estate of his father *H. Roake*;) *H. Roake* and *J. Roake* conveyed the premises to one *Parnell*, to make him tenant to the præcipe, in order to suffer a recovery to the use of *H. Roake* for life; remainder to *S. Trymmer* in fee. *H. Roake* died on or about the 15th of *December* 1775. On the 6th of *June* 1783 *Sarah Trymmer* made and published her last will and testament in writing, in the presence of and attested by three credible witnesses, and thereby gave and devised all her freehold estates in the city of *London* and county of *Surrey*, or elsewhere, in the words following; that is to say, "I hereby give and devise all my freehold estates in the city of *London* and county of *Surrey*, or elsewhere, to my nephew *John Roake*, for his life, on condition that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew *J. Roake*, I devise all my said estates, subject to and chargeable with the payment of 30*l.* a year to *Ann*, the wife of the said *J. Roake*, for her life, by even quarterly payments, to and among his children, lawfully begotten, equally at the age of twenty-one, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs at his or her age of twenty-one." And for default of issue of *J. Roake*, to certain other persons in the will mentioned. *S. Trymmer* died on the 4th of *December* 1786, without revoking her said will, the said *J. Roake* being then living and her heir at law. *S. Trymmer* had not at the time of making her will, or at the time of her death, any other freehold lands, tenements,

ments, or hereditaments in the county of *Surrey*, than those mentioned in the declaration. The special verdict then contained the finding of other facts, shewing the title of the lessor of the plaintiff, which it is not necessary to state, as the judgment, of the Court below and of this Court, was founded upon the will of *S. Trymmer*; it being admitted, that if the will did not operate as an execution of the power reserved to *S. Scott*, afterwards *Trymmer*, by the deed of 1750, the plaintiff was entitled to recover. Judgment was given in the court below for the defendant, and thereupon a writ of error was brought, and the common errors assigned. The case was, on a former day in this term, argued by

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Preston for the plaintiff in error. If the will of *Sarah Trymmer* operated as an appointment of that moiety of the estate in *Surrey* of which she was tenant for life, with a power of appointment, then it is conceded that the lessor of the plaintiff is not entitled to recover. But whoever exercises a power of appointment must shew a clear intention to exercise it. All the cases from Sir *Edward Clere's case* (a) down to the present time proceed on that principle; and the same principle is equally involved in the doctrine of elections as applied by courts of equity. There must be something specific, some reference to the power or to the subject-matter of the power, so as to shew that the attention of the party supposed to exercise it was directed to his power. A residuary or general devise is not sufficient for this purpose. These propositions cannot be disputed; the only ques-

(a) 6 Co. 18.

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tion is on the application of them to each particular case. Now the words of this devise are, "I give all my freehold estates in the city of *London* and county of *Surrey* or elsewhere to my nephew *J. Roake* for life." Those words certainly are not sufficient to raise an inference of an intention in the testatrix to deprive her nephew of the estate-tail in one moiety, to which he was entitled under the settlement, and to give him merely an estate for life in that moiety of the lands in question. Had the testatrix used the words "all my estate *called A.*, in the county of *Surrey*," that expression might have passed both moieties. By describing the estate by name she would have shewn that she acted under the power as to that portion or moiety over which she had only a power of appointment. For the defendant reliance will be placed on the condition annexed to the devise, "on condition that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair." But there is in that direction to repair nothing to shew that she had her power of appointment in view; the direction is applicable to those estates only which she had before given, and, therefore, cannot enlarge the effect of the words of devise. Suppose portions had been raisable by the settlement, and legacies had been given to the same persons by this will, could it be contended that the portionists must be put to their election to forego their legacies or their portions, and yet that consequence must follow, if it be held that the testatrix manifested an intent to exercise the power. All the principal cases were cited in the judgment delivered by *Best C. J.* in the Court below, but they do not warrant the conclusion to which that Court came. *Sir Edward*

Clerk's

Cler's case was the earliest of the authorities cited on this point. It was in that case resolved, that if a man make a feoffment to the use of his will, and afterwards by his will devises the land itself, without any reference to his authority, there the land shall pass by the will, under the seisin or ownership, and not under his power; but in the principal case as the land could pass only by virtue of an authority in the testator, it was held that the will should operate as an execution of that authority, since otherwise the devise would be utterly void. In *Maddison v. Andrew* (a) it was held that the will operated as an execution of the power, because the testator having used in the bequest the word *charge*, which was the very term used in the power, must be taken to have intended to execute that power. On the contrary, in *Andrews v. Emmott* (b) the testator had a power to charge a sum of 3000*l.*, but he did not in express terms execute the power: there was not any expression to shew an intention to execute the power, and there was other property on which the will might operate, and it was held that the power was not executed; and *Ex parte Caswall* (c) was to the same effect. So also in *Langham v. Nenny* (d), *Nannock v. Horton* (e), *Bennet v. Aburrow* (f), and *Bradley v. Westcott* (g), it was held that express words or clear intentions were necessary to execute a power. For the defendant it must be said, that the general direction to repair shews an intention to pass the entire estate, and as embracing both moieties, that the intention to pass the whole estate shews an

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(a) 1 *Ves. sen.* 57.(b) 2 *Br. Ch. Ca.* 297.(c) 1 *Atk.* 559.(d) 3 *Ves.* 467.(e) 7 *Ves.* 391.(f) 8 *Ves.* 609.(g) 13 *Ves.* 445.

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intention to execute the power. *Standen v. Standen* (a), before Lord *Loughborough*, is the strongest case that can be cited for the defendant; but *Best C. J.*, in giving the judgment of the Court of Common Pleas in the case now before the Court, says that the reasoning of Lord *Loughborough* is supported by no previous authority, and has been objected to in many subsequent cases. *Jones v. Tucker* (b), and *Jones v. Currie* (c), are also strong cases in favor of the lessor of the plaintiff; and in *Coates v. King*, decided in 1821, before the privy council, where *Alexander Coates* had divided by will his real property in *Antigua* among his three sons, with power to one of them to dispose by will of his share, the son being possessed of considerable real and personal estates in *Antigua*, independent of that given by his father's will, devised in these terms, "all my real estates in *Antigua*, and all other my real estate whatsoever and wheresoever;" and it was held that the will did not pass that property over which he had the power.

Jennett contra. It may be admitted, that neither a general devise or a residuary devise will carry an estate, over which the testator has merely a power without any interest. It is necessary that an intention to execute the power should appear. But with respect to the media through which such intention may be ascertained, it makes a great difference whether the will relates to real or personal property. Where the devise is of the latter the intention to pass it must be apparent on the face of the will: the Court cannot inquire into the circumstances or situation of the testator; but a different rule has been laid down and acted upon, where the will is of real

(a) 2 Ves. jun. 589.

(b) 2 Mer. 533.

(c) 1 Swanst. 66.

estates,

estates, *Standen v. Standen*, *Nannock v. Horton*, *Jones v. Currie*. Now, looking at the circumstances under which this will was made, it is found that property descended to the testatrix and her sister Mrs. *Roake*, as co-heiresses, and they and their husbands made a settlement, whereby, in the event of either dying childless, her moiety would go to the sister for life, with remainder to her children, if any, in tail; but each reserved a power of appointment over her own moiety. This shews an intention, that if one only of the sisters had issue, the whole estate should go to her family, and should not be divided. Mrs. *Roake* died, leaving one son, who, under the settlement was tenant in tail. He suffered a recovery, and then sold and conveyed his moiety to the testatrix in fee. Testatrix had no children, and being aware that she had purchased her sister's share, and thereby gained the entirety of the estate, she devised all her freehold estates in *London*, *Surrey*, or elsewhere, to her nephew. Nothing can be more clear than her intention to give to him the whole estate, which was hers during her life. It is true, she calls it *her estate*, but she does not mean to give her interest in the land, but to vest in her nephew all the land, which, at the time of making the will, she was entitled to call hers. The case of *Standen v. Standen* is a strong authority in favor of this construction; and although observations may have been made upon some of the words attributed to Lord *Loughborough*, yet the decision was affirmed on appeal to the House of Lords, and has never since been questioned. There, the testator directed his real estate to be sold, and gave the money arising from the sale, and the residue of his personal estate, in trust for his wife for life; and after her decease, as to one moiety,

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for such person or persons as she should by any deed or writing, or by will, with two or more witnesses, appoint. The real estate was not sold. Testator's widow received the rents and profits, and the produce of the personal estate for her life; and by her will, after disposing of some specific articles, she devised in the following words: "I give all the rest, residue, and remainder of my estate and effects, of what nature or kind soever, and whether real or personal, and all my plate, &c. which I shall be possessed of, interested in, or entitled to at the time of my decease, subject to, and after payment of all my just debts, funeral expences, and charges of proving my will, and specific legacies, I give to S. H.;" and it was held, that the moiety of the real estate, devised by the first will, passed by this will. The Lord Chancellor says, "It is a little hard to attempt to explain that it was not her estate. How could she have it more than by enjoyment during life, and the power of disposing to whatever person, and in whatever manner she pleased, with the small addition of two witnesses?" And this was cited and relied upon by Mansfield C. J., in *Morgan d. Surman v. Surman* (a); and in that case, and in *Roach v. Wadham* (b), and *Dillon v. Dillon* (c), a liberal construction as to the intention of executing the power prevailed. The cases respecting personal property ought not to be considered as authorities against the present defendant, on account of the rule which in those cases prevents the Court from ascertaining, by extrinsic evidence, the intention of the testator. *Hales v. Margerum* (d), a case as to personal property is, however, in favor of the defendant, and is

(a) 1 Taunt. 289.

(b) 6 East, 289.

(c) 1 Ball & Beatty, 77.

(d) 3 Ves. 299.

the

the stronger in consequence of that rule. *S. Rutter* by his will gave "to his executors 1000*l.* consols, for the sole use and benefit of his daughter *E. T.*, independent of her husband, and whenever she shall happen to die, the said 1000*l.* annuity stock shall be absolutely in her own power to dispose of by her last will and testament." *E. T.* made her will as follows: "All my freehold messuages, lands, &c., and also all my stocks, funds, monies, and securities, and all other my real and personal estate and effects whatsoever, I give to *S. M.*;" and it was held that the 1000*l.* consols passed by these general words. Besides the intention to be presumed from the circumstances under which the present will was made, there is the direction to repair, which is by no means unimportant, although not of itself decisive. If the whole estate passed, the condition as to repair is sensible and intelligible, if only a moiety passed, it is difficult to understand or to carry into effect that condition.

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Preston in reply. In *Standen v. Standen* the testatrix had not any real estate except that over which she had a power, and therefore unless that property subject to her power had passed, the will would have been inoperative. The decision that the estate passed was right, but the reasoning of the Lord Chancellor was at variance with all the other cases. In *Hales v. Margerum* it was held that the testatrix had an interest in the 1000*l.* consols; and the will operated on her interest, and not as an execution of a power. In *Morgan d. Surman v. Surman* the particular message subject to the power was mentioned in the will, and that circumstance has always been deemed sufficient proof of an intention

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intention to execute the power. So also in *Dillon v. Dillon* there was a reference to the estate. None of these cases in any degree break in on the rule that the intention of the testator to execute a power must be clear and indisputable; and no attempt has been made to answer the case from *Antigua*. The argument from the direction to repair is founded on a fallacy: it assumes that the direction extends to the whole or entire estate, whereas it applies only to that which was before devised. Had one moiety belonged to a stranger, it would never have been supposed that the testatrix devised her moiety with a condition or obligation that the devisee should repair the whole.

Cur. adv. vult.

The judgment of the Court was now delivered by ARBOTH C. J. The principal authorities bearing on this question were all referred to and commented upon in the elaborate judgment delivered by the Lord Chief Justice of the Court of Common Pleas; and it is unnecessary for me to refer again to them. The rule or principle of decision applicable to this case has its origin in the case of *Sir E. Clere* (a). The best exposition of it seems to be that given by Lord Chief Justice Hobart in the *Commendam* case (b), "If an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority; and so you must take it, for *fictionem credit veritati*. And therefore so it was ruled in *Sir E. Clere's* case, that if a man be seised of three acres of land

(a) 6 Co. 17 b.

(b) Hob. 159, 160.

holden

holden in chief, and make a feoffment of all to the use of such person, and of such estate as he shall give or dispose by his will, and after by his will gives and devises all his lands to J. S. and his heirs, that this shall carry but two parts of the land in point of devise. And, lastly, where an interest and authority meet, if the party declare clearly that his will is that this act shall take effect by his authority or power, there it shall prevail against the interest; for *modus et conventio vincunt legem*. And, therefore, in the same case of *Clere* it is agreed, that if the devisor had recited his power, and had relied upon that, all would have passed by express declaration of the party himself. Nay more, though the party do not make an express declaration, yet if his act do import a *necessity* to work by his power, or else to be wholly void, the benignity of the law will give way to effect the meaning of the party; and therefore in that case it was resolved, that whereas *Clere* was seised, for example, of three acres of land, every one of equal value, and conveyed two of them to his wife for her jointure, and afterwards made a feoffment of the third to the use of such person, &c. as before, and then devised that third acre *ut supra*, that devise was good by force of the authority; for else the whole devise had been utterly void, having before given the other two parts to his wife. In more modern times, the rule has been expressed by Lord *Thurlow* in the following words: "To execute the power, it must be impossible to impute to the testator any other intention than that of executing it:" the doctrine, he says, is not by any case carried further than this. The distinction most frequently occurring, and which serves for illustration, as well as application of the rule, is this: if a will contain
a devise

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a devise of all the testator's lands generally, and he has some lands upon which the will may work by his interest, the law will attribute the will to his interest; and land of which he has only a power to devise will not pass. So if the will be of all his lands in a county or place named, and he has lands of his own therein. On the other hand, if the testator has no lands, or none in the county or place named, upon which the will may work by his interest, there the law will attribute the will to his power, and will infer that he intended to execute his power; because if that be not done, the will will be void, either wholly or so far as respects the county or place named.

In the case now before the Court the testatrix has not referred to her power, and she had lands in the county of *Surrey*, upon which the will may work by her interest; viz. the other moiety of the tenements in question; and therefore if there were nothing more in the case, it seems very clear that the law could not attribute the will to the power, nor infer that she intended to execute the power.

It remains then to be considered, whether there be any thing more, either apparent upon the will, or existing as fact dehors the will, from which it can be satisfactorily and safely inferred that she intended to execute her power.

The will contains in itself an injunction on the devisee to keep the devised estates in repair.

The facts existing dehors the will are these: the estates had originally belonged to the father of the testatrix. One moiety had descended upon her, and another upon her sister *Roake*. The two sisters and their husbands had settled their moieties in such a manner

manner as to give the moiety of either, who might die without issue, to the issue of the other, subject to a power to each to make a different disposition of her moiety by deed or will. The sister of the testatrix left issue, from whom the testatrix purchased the sister's moiety, and thus became seised of one moiety in fee and of another for her life, with a power to dispose of the fee of the latter moiety.

The question then is, whether from these matters it can be safely and clearly inferred that the testatrix intended to execute her power. Now it appears by the will that the testatrix had estates in *London*, or at least supposed she had, and made her will upon that supposition. *And we see nothing repugnant to reason or to the ordinary sentiments and intentions of mankind, in supposing that a person having estates in London, and an undivided moiety only of estates in Surrey, might make a will containing such an injunction as the present, leaving that injunction to take effect as far as by law it could.* And even if it should be inferred from this part of the will that the testatrix meant thereby to give the entirety of the lands in *Surrey*, still it will not necessarily follow that she intended to execute her power, and this for the reason hereafter mentioned.

So if the extrinsic facts should lead to an inference that the testatrix cannot have intended to make a strict settlement of the purchased moiety upon the family of her sister, and leave that which was originally her own unsettled and undisposed of, still in our opinion it will not necessarily follow that she intended to execute her power. It may be that she intended her will to work by her interest in the tenements. It may have happened

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pened that she had entirely forgotten the settlement, and supposed at the making of her will that she was then seised of the entirety of the estates in fee, as but for that settlement she would have been. The settlement was made in the life of her first husband, thirty-three years before the date of her will. The only fact upon the special verdict, shewing that this settlement was ever thought of in the interval, is the release under which she purchased her sister's moiety in 1775, by which that moiety was conveyed for the purpose of suffering a recovery. This took place eight years before the date of her will, and no recovery was suffered till after her death, though she lived eleven years, and must have been in possession of this moiety for nine years, the tenant for life, her sister's husband, having died in 1775. It appears to us to be at least as probable that she had forgotten the settlement, and intended the will to work by an interest, as that she intended to execute the power contained in the settlement, and even more probable, because the language of the will is exactly such as would be used by a person who at the time supposed herself to have an estate in fee in the entirety of the tenements, and not such as would be used by a person who was conscious that she had a power only over one moiety, and a seisin in fee of the other.

Although, therefore, we may think the testatrix intended that the entirety should go in strict settlement on the family of her sister, yet we think it is possible to suppose that the testatrix had no intention to execute the power. And if the intention to execute the power be doubtful, the will cannot in our opinion be deemed to be an execution of it.

For

For these reasons we think that the judgment must be reversed. (a)

Judgment reversed.

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(a) The opinion of the Court of Common Pleas was pronounced by the Lord Chief Justice of that Court on the 7th of *February* 1825. The plaintiff, on the 20th, sued out his writ of error in K. B. returnable in fifteen days from the day of *Easter*. On the 20th of *April* 1825, the defendants served the plaintiff with a rule to transcribe, and the transcript was completed in due course. On the 10th of *June* the defendants taxed their costs, and on the 14th of the same month (*Trinity* term) signed judgment. In *Michaelmas* term, 1825, the defendants served the plaintiff with a rule to assign errors, and the plaintiff having delivered his assignment of errors, the defendants, in the same term, delivered the joinder in error. The case was afterwards argued, and the judgment of the Court of Common Pleas was reversed, and the plaintiff afterwards taxed his costs.

Garney, in *Michaelmas* term, moved to quash the writ of error, on the ground that it was returnable before costs in the Court below were taxed, and consequently before any judgment was given in that Court; and he cited *Wilson v. Ingoldby* (1), where it was held, that a writ of error will not reverse a judgment given after the term in which it was returnable: and though the record be transcribed after judgment given and carried into the Court in which the writ of error is returnable, the judgment is not to be considered as removed. He also cited *Canning v. Wright* (2), *Gould v. Coulthurst* (3), *Rejinder v. Randolph* (4), *Fice v. Burton* (5), *Cook v. Horrock* (6), and *Stevens v. Ingram*. (7).

ABERT C. J. The defendants ought, in an earlier stage of the proceedings, to have applied to the Court to quash the writ of error. But they have joined in error, and by their counsel have appeared upon argument, and the judgment of the Court of Common Pleas has been actually reversed. They are much too late, therefore, to quash the writ of error.

Rule refused.

(1) 2 *Ld. Raym.* 1179.

(3) 1 *Str.* 139.

(5) 2 *Str.* 891.

(7) 3 *Taunt.* 384.

(2) 2 *Ld. Raym.* 1531.

(4) 2 *Str.* 384.

(6) *Barnes*, 197.

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June 10th.

The KING against FLOWER.

An indictment under the 39 G. 3. c. 85. against a servant for embezzlement, must set out specifically some article of the property embezzled; and an indictment charging that the prisoner "took and received, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10*l.*, and afterwards embezzled the same," was held bad.

THE prisoner was indicted under the 39 G. 3. c. 85., for that he, being the servant of *A. B.*, on, &c., did, by virtue of his employment as such servant, receive and take into his possession, for and on account of the said *A. B.* divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10*l.*, and afterwards embezzled it. The prisoner pleaded guilty, at the Spring assizes for *Wilts*, 1825, and was adjudged to be transported for the term of seven years. A writ of error having been brought upon that judgment,

R. Bayly, in support of the judgment, contended, that the indictment was sufficient; and he relied upon *Rex v. Johnson (a)*. There the indictment charged the prisoner with embezzling divers, to wit, nine bank notes, for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.*, and it was held to be sufficient. [*Bayley J.* There the words *bank notes* were held to be a sufficient description of the thing embezzled, because they are specifically mentioned in the act of parliament.] Money is also specifically mentioned. In *Rex v. Carson (b)* it was held, that an indictment for embezzling need not set out the exact sum embezzled.

(a) 3 M. & S. 539.

(b) *Russell & Ryan's Cr. Cas. Res.* 305.

Per

Per Curiam. This case must be governed by that of *Rex v. Furneaux*. (a) The indictment in that case charged that the prisoner being a servant, &c., received the sum of 1*l.* 11*s.*, on account of his master, and feloniously embezzled the same, &c. It appeared in evidence, that 1*l.* 11*s.* had been paid to the prisoner on account of his master, but it did not appear whether the same was paid by a 1*l.* note and 11*s.* in silver, or by two notes of 1*l.* each, or by a 2*l.* note, and the change given by the prisoner. The prisoner being found guilty in *Trinity* term, 1817, eleven Judges (*Burrough* J. dissentiente) were of opinion that the indictment ought to set out specifically some one article at least, of the property embezzled, and the conviction was held to be wrong; and in *Rex v. Tyers* (b), *Michaelmas* term, 1817, it was held, upon a question reserved by Lord Chief Justice *Abbott* for the opinion of the Judges, that an indictment must describe, according to the fact, some of the property embezzled. The indictment, in this case, is insufficient, because it does not describe any part of the property embezzled; and the judgment must, therefore, be reversed.

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Judgment reversed.

(a) *Russell & Ryan's Cr. Cas. Res.* 336.

(b) *Ib.* 402.

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TOMLINSON against BENTALL and Another.

A pauper, being casually in the parish of *A.*, met with an accident which disabled her, and which required immediate medical assistance. The constable of that parish improperly removed her to her own (which was the adjoining) parish, and sent for the surgeon of that parish to attend her: Held, that it was the duty of the parish officers of *A.* to have taken the pauper to the nearest convenient house in *A.*, and to have provided medical attendance there, and that they could not, by improperly removing her to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them, and that they were therefore liable to pay the surgeon's bill.

THIS was an action of assumpsit brought to recover the amount of a surgeon's bill. At the trial before *Graham B.* at the Spring assizes for the county of *Essex* 1826, the following appeared to be the facts of the case: The plaintiff was a surgeon and apothecary residing at *Malden*. The defendants in 1824 were overseers of the poor of the parish of *Heybridge*. In *October* in that year, one *P. Bannister*, a poor woman belonging to the parish of *Malden*, returning from *Witham* to *Malden* in a cart, about 10 o'clock at night, was thrown out of the cart in the parish of *Heybridge*, near to a public house there called the *Hoy*. Her thigh was broken, and she was otherwise much hurt. The constable of the parish of *Heybridge* being sent for, desired her to be sent out of that parish. She was placed again in the cart, and taken over a bridge (which divides the parishes of *Heybridge* and *Malden*); the driver of the cart then remonstrated with the constable, and told him that he was wrong in removing her from *Heybridge*. Upon this the constable ordered her to be taken back to *Heybridge*, and said he would go and consult a neighbouring magistrate. The magistrate, who was also churchwarden of the parish of *Heybridge*, advised him to take the woman to the nearest public-house, and to lay her thigh straight, and send for a doctor. The landlord of the *Hoy*, which was the nearest public-house, refused to take her in. The driver of the cart then suggested to the constable to take her to the poor-house. The constable said he did not know where they would

would put her. The pauper, who had been exposed to the cold air for some hours, said, "If you do not know where to put me, for God's sake take me home." The constable desired a bystander to pay attention to the request made by the pauper to be sent home, as it was likely they might be called to speak to the fact upon some future occasion. She requested not to be put under the care of the plaintiff (who was apothecary of the parish of *Malden*), but of one *Thorpe*, who was apothecary of *Heybridge*. The constable then desired her to be taken to *Malden*. The driver of the cart refused to take her back to *Malden*, unless the constable would give him a note that she should be taken care of by the parish of *Heybridge*. The constable said he would, but he did not. He accompanied her to her house at *Malden*, where she arrived about two o'clock in the morning, and asked *Thorpe*, the apothecary to the parish of *Heybridge*, to attend her, and told him the pauper was at her own house. *Thorpe* said that in that case he, as the apothecary of *Heybridge*, had nothing to do with her. The constable then sent for *Tomlinson*, and the latter attended her for several weeks. Upon this evidence it was insisted at the trial, first, that as there was not any express promise by the parish officers of *Heybridge* to pay for the medical attendance given in the parish of *Malden*, the defendants were not liable; and *Atkins v Barwell* (a), and *Wing v. Mill* (b) were cited. The learned judge was of opinion, that there was some evidence to go to the jury, that the magistrate, who was churchwarden, and the constable, felt the obligation to afford the pauper relief, and that the constable actually undertook to pay the plaintiff for his attendance; and secondly, he

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(a) 2 East, 505.

(b) 1 B. & A. 104.

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was of opinion, that as the accident which happened in the parish of *Heybridge*, was one which required immediate care and attention, it was the duty of the officers of that parish to have taken the pauper to the house nearest to the place where the accident happened, and where they could procure accommodation for her, and to have provided medical assistance immediately, and if, as humanity required them to have done, they had sent for a surgeon to attend her in that parish, they would clearly have been liable; and that they could not, by neglecting their duty and removing her to another parish, relieve themselves from that liability which the law had cast upon them. The jury having found a verdict for the plaintiff for the amount of his bill, a rule nisi for a new trial was obtained in last *Easter* term, upon the ground that there was not an express promise by the defendants to pay the plaintiff, and that under the circumstances of the case, the law would not imply a promise on their part.

Gurney and *Chitty* shewed cause. The accident having occurred in the parish of *Heybridge*, it became the duty of the officers of that parish to provide immediate medical assistance for the pauper. They ought to have taken her to the nearest house in the parish of *Heybridge*; but in order to relieve the parishioners from a burden which the law had cast upon them, one of the officers of that parish fraudulently and improperly removed the pauper. In *Lamb v. Bunce (a)*, Lord *Ellenborough* laid it down "that the pauper was to be considered as casual poor wherever his infirm and indigent body was found, and he had a claim on the parish

(a) 4 M. & S. 275.

where he was so found to have his necessities provided for." It is, therefore, clear, that if the pauper had been taken to the nearest house in the parish of *Heybridge*, and the plaintiff had attended her there, the defendants as the parish officers of *Heybridge* would have been liable, and they ought not to be released from that liability by their own improper conduct.

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Nolan contra. The obligation to relieve casual poor arises from the party being in the parish where he is casual poor. It was decided in *Lamb v. Bunce* (a), that the parish where the pauper necessarily resides during the time the medical assistance is given, and not where the accident happens, is liable for the expence of his cure. Now here the pauper during the time of her illness was in the parish of *Malden*, and not in that of *Heybridge*. In *Atkins v. Banwell* (b) it was held that the law will not raise an implied promise, in the parish where a pauper is settled, to reimburse the money laid out (by another parish in which he happened to be) in providing necessary medical assistance for him. In this case, a fortiori, no promise can be implied by law on the part of the parish officers of *Heybridge* to pay for the surgical assistance given to the pauper, who was settled and actually residing in *Malden*. In *Wing v. Mill* (c), a pauper residing in one parish received, during illness, a weekly allowance from another parish where he was settled, and it was held that an apothecary who had attended the pauper might maintain an action for the amount of his bill against the overseer of the latter parish who had expressly promised to pay. Here there

(a) 4 M. & S. 275.

(b) 2 East, 505.

(c) 1 B. & A. 104.

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was no express promise by the defendants. The constable might be criminally responsible for fraudulently removing the pauper, but his conduct cannot make the parishioners of *Heybridge* liable to the burden of maintaining the pauper during her illness.

ABBOTT C. J. I am of opinion that this rule must be discharged. The pauper met with the accident in the parish of *Heybridge*, an accident that entirely incapacitated her from going to her own place of abode; and, therefore, if she had been taken to any house in *Heybridge*, as she ought to have been, and relief had been administered to her there, it is clear that the parish officers would have been liable for the expences of her cure. *Res v. The Inhabitants of St. James, in Bury St. Edmunds* (a) is an authority to show that it would not have been competent to the parish officers to have removed her, as a person coming to settle in *Heybridge*. If she had been taken to a house in *Heybridge*, therefore, the parish officers would have been under a moral and legal obligation to provide assistance for her. One of the parish officers did very properly recommend her to be taken to the nearest public house, which was in *Heybridge*. The occupier of that house did not think proper to open his doors and receive her. A proposition was then made to take her to the poor-house; and upon the way thither some conversation took place, which excited in the mind of the poor woman (who at that time had been lying in the cold some hours) an alarm, whether, when she arrived there, she should be properly treated, and she said, "For God's sake, take

(a) 10 *East*, 25.

me to my own house;" and she was then taken home. The first proposal was, to take her to her own parish; but, upon a remonstrance by the driver of the cart, the constable desisted. She was, however, ultimately taken to her own house. The constable of *Heybridge* sent to the plaintiff, and desired him to take care of her. As the parish officers of *Heybridge* must have paid for the medical attendance if she had remained there, it seems to me, that the removal from that parish to another (although it was her own) coupled with the fact that the surgeon was called in from the parish of *Malden*, does not relieve the inhabitants of *Heybridge* from the obligation to which they would have been clearly liable, if this woman had been taken to some house in that parish, and taken care of there; and for these reasons I think that the verdict was right.

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BAYLEY J. I am of opinion that the verdict was right. It is of very great importance, with a view to the protection to which the poor are entitled, that it should be fully understood upon whom, under such circumstances as those which have occurred in the present case, the legal obligation to provide medical attendance attaches. I do not put the case upon the ground of moral obligation, or upon the ground of the constable's having sent for and employed the plaintiff; but I put it upon the ground that the law imposed a legal obligation upon the parish officers of *Heybridge*, to employ a surgeon for the cure of the pauper. I think it is highly prejudicial to the rights of the poor, that when an accident has happened, the question should be agitated or even pass in the minds of those persons in whose power

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the sufferer is of necessity placed, whether a burden which must fall somewhere, must be borne by them, or can by any contrivance be shifted to others. It is of importance, therefore, that it should be certain upon whom the obligation to provide medical attendance rests. For otherwise the consequence will be, that poor persons, who ought not to be removed from the place where they have met with an accident, will perhaps at the risk of their life, but certainly with great aggravation of their sufferings, be removed to a distance. In this case the pauper met with the accident in *Heybridge*, which incapacitated her from moving herself from the spot where it happened. The best and most obvious course would have been, to have done that (which the

magistrate of the place suggested should be done) viz. to have removed her into the public-house, but if she was not placed there, she ought to have been placed in the poor-house, or at all events she ought to have been sent to some house in the parish. I am of opinion that, when the parish officers refused her an asylum in that parish where she was entitled to have it, and forced her to go to her own house, all the attendance given by the plaintiff in the parish of *Malden*, in consequence of the wrongful conduct of some of the parishioners of *Heybridge*, is to be considered as if it had been given in the parish where the accident happened, and as if the house which she occupied, had been in the parish of *Heybridge*. In *Lamb v. Bunce* (a), Lord *Ellenborough* speaks not of a moral, but of a legal obligation attaching on the parish, where the pauper lies sick or disabled, to provide assistance: he says, "It cannot be matter of

(a) 4 M. & S. 277.

dispute

dispute in point of law, and I could wish it were so understood, that where time is not afforded for procuring an order of justices, the law raises an obligation against the parish where the pauper lies sick as casual poor, to look to the supply of his necessities:" and, therefore, upon that authority I consider, that as in this case the party met with the accident in *Heybridge*, that was the proper place for her to be in, and that the law raised a legal obligation in the parish officers of *Heybridge* to give her relief. Lord *Ellenborough* afterwards says, "If the parish officer stands by and sees that obligation performed by those who are fit and competent to perform it, and does not object, the law will raise a promise on his part to pay for the performance." Now, although the attendance was not given in the parish of *Heybridge*, but in the parish of *Malden*, yet as one of the parish officers of *Heybridge* knew that the attendance was indispensably necessary, and that the removal from *Heybridge* to *Malden* had been wrongful; it seems to me exactly the same, as if the parish officers had stood by and seen the attendance of the surgeon upon the pauper in the parish of *Heybridge*. There was a subsequent case of *Gent v. Tomkins* (*Trinity* term, 1822), in this Court, which seems to support the principle, that the law casts the obligation, of providing medical attendance for a pauper, disabled by an accident, upon that parish where the accident has happened. In that case the action was brought, not against the overseers of the parish in which the accident happened, but against the overseer of the parish to which the pauper belonged, and the Court intimated a very strong opinion that it was not properly brought against the overseer of the

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the latter parish. (a) It may sometimes happen that the parish in which the accident happens may not be the proper place to give relief. It may happen that the parish

(a) GENT v. TOMPKINS.

This was an action of assumpsit for work and labour bestowed by the plaintiff as a surgeon and apothecary, in and about the cure of one *Tyrrell*. Plea, general issue. At the trial before *Richards C. B.*, at the Spring assizes for the county of *Bucks*, 1822, the following appeared to be the facts of the case. The plaintiff was a surgeon and apothecary, residing in the parish of *Winslow* in the county of *Bucks*. The defendant in 1820 was overseer of the poor of the parish of *Newton Longville*. On the 22d of September in that year, *Tyrrell*, a pauper, (whose settlement was in *Newton Longville*) met with a severe accident in the parish of *Winslow*, that rendered it unfit that he should be removed. He was taken to a public-house in that parish, and the plaintiff attended him there until the 25th of November following. About a fortnight after the accident happened, the defendant (who resided in *Newton Longville*) called upon the plaintiff at his house, and expressed his approbation of the care bestowed by the plaintiff upon the pauper, and desired that he might continue to receive every attention, and he, the defendant, would see the plaintiff paid. The defendant asked if the pauper required any wine, and upon the plaintiff's saying that he did, the defendant desired that the pauper might have it. The plaintiff, in the first instance, had claimed the amount of his bill from the parish officers of *Winslow*, but that was by the advice of his attorney, who did not at that time know that the defendant had employed the plaintiff. It was contended that the defendant was not liable. For although the pauper was settled in *Newton Longville*, the obligation to provide medical assistance lay on that parish where the pauper was compelled to continue in consequence of the accident, and consequently that the parish officers of *Winslow*, where the accident occurred, and the medical assistance was given, were liable to pay the plaintiff. The Lord Chief Baron reserved the point for the opinion of the Court, and directed the jury to find a verdict for the plaintiff for 19*l.* 10*s.*, the amount of his bill. A verdict having been found accordingly, a rule nisi for entering a nonsuit was afterwards obtained in *Easter* term.

Storks and *C. F. Williams*, in *Trinity* term, 1822, shewed cause. It must be admitted that the parish officers of *Winslow*, where the pauper necessarily lay sick in consequence of the accident, were, in the first instance, under a legal obligation to provide medical assistance for him.

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parish officers, without entering into the question what are the limits of particular parishes, will do that which ought to be done immediately, namely, carry the pauper

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Rex v. St. James, in *Bury St. Edmunds* (a), *Rex v. St. Lawrence, Ludlow*. (b) It must be admitted, also, that the law will not raise an implied promise from a moral obligation, *Atkins v. Banwell*. (c) But in this case there was an express promise by the defendant. He first adopts all that has been done, and then promises to pay the plaintiff. And the pauper being settled in *Newton Longville*, the defendant was under a moral obligation to provide for him; and a moral obligation is a sufficient consideration for an express promise, *Watson v. Turner*. (d)

Dover and Monro contrâ. The defendant, as overseer of *Newton Longville*, was not under any legal obligation to provide medical assistance for the pauper. The legal obligation was on the parish of *Winslow*, where the accident happened, and where the pauper of necessity lay sick during the time the plaintiff attended him. At the time when the defendant made the promise, a part of the sum now claimed constituted a debt due to the plaintiff from the parish officers of *Winslow*. As to that sum, the promise was to pay the debt of another, and not being in writing, was void. But the overseer was not under any moral obligation to support the pauper. There was no moral obligation, independent of the legal liability, created by statute, and the legal liability to maintain casual poor during sickness lies on that parish where the pauper continues by reason of his accident. [*Bayley J.* Although the promise may be void as to the by-gone time, may it not be binding as to the future time? It was uncertain by whom the plaintiff was originally employed, and he might have ceased to attend the pauper when he pleased. Suppose he was induced by the promise of the defendant to continue his services, would not that be a sufficient consideration for the defendant's promise, so as to make him responsible for the attendance subsequently given?] It ought, at all events, to have been submitted as a question of fact to the jury, whether, after the making of the promise by the defendant, the plaintiff continued to attend the pauper on the part of the parish of *Winslow*.

It was suggested by the Court, that the purposes of justice might be answered by the defendant paying the plaintiff 9*l.* 16*s.*, and the latter

(a) 10 *East*, 25.

(c) 2 *East*, 505.

(b) 4 *B. & A.* 660.

(d) *Bull. N. P.* 147.

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to the house nearest the place where the accident happens, instead of carrying her to a considerable distance. In *Lamb v. Bunce* the impression of the Court was, that the parish in which the house was situate was the proper parish to have given the relief; but, without deciding that point, I am of opinion that in this case, inasmuch as the accident happened in the parish of *Heybridge*, and that was the place where, under all the circumstances, the pauper was entitled to receive surgical assistance, the plaintiff is entitled to look to the parish of *Heybridge* for payment of his bill.

HOLROYD J. The accident having happened to the pauper in the parish of *Heybridge*, it was the duty of

entering a *stet processus*. The defendant's counsel assented to this proposition, and the case stood over for some days, to give the plaintiff's counsel an opportunity of consulting their client. It was then intimated that they had received no instruction on the subject.

ABBOTT C. J. We are clearly of opinion that the defendant, as overseer of the parish of *Newton Longville*, was not bound by law, in the first instance, to provide medical assistance for the pauper. The obligation to do that lay on the parish of *Winslow*, where the accident happened, and the pauper was compelled to remain in consequence of it. The officers of that parish are clearly bound to pay the plaintiff for his care and attendance bestowed upon the pauper before the defendant made his promise; but if the plaintiff subsequently to that period was induced to continue to attend the pauper in consequence of the promise, the latter may perhaps be liable for such attendance, but he certainly is not liable to the extent of the present verdict. The question ought to have been submitted to the jury, whether the plaintiff, after the promise made by the defendant, was thereby induced to continue his attendance on the pauper. The rule for a new trial must therefore be made absolute.

Rule absolute.

The cause was afterwards settled, the defendant having paid 50*l.* to the plaintiff in satisfaction of debt and costs.

the

the officers of that parish to provide medical assistance for her there. They might have done that although the occupier of one public house refused to receive her. But I think they could not, by removing her elsewhere, shift upon other people that burden which the law cast upon themselves; and that, whether they procured the medical assistance to be given *in* the parish or *out* of the parish, they are liable.

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LITLEDALE J. I am of the same opinion. Whenever any accident happens to a poor person of such a serious nature as to render removal out of the parish dangerous or improper, I think the law casts an undoubted obligation on that parish to administer all necessary relief. If the pauper in this case had actually been taken to a house in *Heybridge*, and resided there while the surgeon was attending her, that parish would have been liable for her cure; but it appears to me that, under the circumstances of this case, she was improperly taken out of the parish; and that any officer or inhabitant taking her to another parish, where it was improper to take her, cannot by so doing release the inhabitants of the former parish from the obligation. I think, therefore, that this rule should be discharged.

Rule discharged.

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Saturday,
June 10th.

HALL and Another against FULLER and Others.

Where a check, drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum: Held, that he could not charge the customer for any thing beyond the sum for which the check was originally drawn.

ASSUMPSIT to recover 197*l.* as money had and received by the defendants to the use of the plaintiffs. At the trial before *Abbott C. J.* at the *London* sittings after *Hilary* term 1824, the jury found a verdict for the plaintiffs, subject to the opinion of this Court on the following case:

The plaintiffs are merchants in the city of *London*, having at the time of the transaction in question an account with the defendants, as bankers. On the 25th or 26th of *August* 1823, *Mr. S. Hill* applied to *J. Hall*, one of the plaintiffs, for the loan of a check for 3*l.* stating at the time it was for a friend to send into the country, upon which *Mr. Hall* drew and delivered to *S. Hill* the check upon the defendants, using for that purpose one of the printed forms with which the defendants supply their customers. The sum for which this check was drawn, was written by *Hall* in words at length, in the body of the check, and also in figures, the latter being in the same line with his signature. *Mr. Hill* had been induced to apply for the loan of the check by one *Wagstaff*, who had applied to him for such a check, and *Hill* having obtained it, handed it over to *Wagstaff*; *Wagstaff* expunged the dates, the figures, and the words three pounds, and also the figures 3*l.* 0*s.* 0*d.* and substituted the words two hundred pounds and 200*l.* in figures, but in such a manner that no one in the ordinary course of business could have observed it. The check so altered was presented by or on account

count of *Wagstaff* to the defendants for payment, on the 29th of *August*, on which day the balance in their hands on the account of the plaintiffs, was only 183*l.* 15*s.* 5*d.* The defendants paid the amount of the check as altered, and having a day or two afterwards received funds to cover the amount over paid on the 29th of *August*, they claimed to retain the whole sum of 200*l.* on account of the check drawn and paid under the foregoing circumstances.

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F. Pollock for the plaintiffs. The plaintiffs are entitled to recover the whole amount of the check. First assuming that the defendants have not been guilty of any negligence, the loss must still fall upon them, for the altered check was not the check of the plaintiffs, and, therefore, the defendants paid the money without any authority. There is no difference in principle between this case and any other forgery. Suppose the body of a draft had been in the handwriting of the plaintiffs, but their signature had been forged, there can be no doubt that if the bankers had paid such a draft they would be liable. Or suppose that it was made payable to a special payee, and his name had been forged, and the bankers paid it to the wrong person, they would have been liable. There is no direct authority in our law upon the subject, but the very point is discussed in *Pothier's treatise du contrat du change*, part 1. c. 4. s. 99. p. 59. It assimilates a case like the present to that of a person employed to execute an order for another (le contrat de mandat). There the employer is bound to reimburse the employee all his expences to which the employment or order gives rise, (provided the employee does not, by his own negligence, disburse

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disburse more than he ought.) But he distinguishes between expences occasioned in the execution of the order or employment, (ex causâ mandati,) and those which are incurred accidentally in the course of the employment or order, and, ultimately, he comes to the conclusion that when a banker pays the full amount of a bill fraudulently altered by the holder, the sum paid beyond that for which it was originally drawn is not a payment made "ex causâ mandati sed occasione tantum," the subsequent fraudulent alteration of the bill which led the banker into error, and which caused him the loss of the sum he had unduly paid, being an accidental circumstance which neither had been, nor could be foreseen, and against which the drawer cannot be supposed to have intended to indemnify the banker. (a)

In

(a) The passage from *Pothier* referred to is the following :

99. Scacchia, *Tract. de Com.* sect. 2. gl. 5. quæst. 1. propose cette question : Le porteur de la lettre de change l'a falsifiée, et a écrit une plus grande somme que celle portée par la lettre : la falsification est faite de manière qu'elle peut tromper une personne attentive et intelligente. Le banquier qui, trompé par la falsification de la lettre qui lui a été présentée, a payé au porteur la somme entière qui paroissoit portée par la lettre, aura-t-il la répétition contre le tireur, son mandant, de ce qu'il a payé de plus que la somme qui étoit effectivement et véritablement portée par la lettre ? Scacchia décide pour l'affirmative. On peut dire pour son opinion, que selon les règles du contrat de mandat, le mandant s'oblige à rembourser le mandataire de tous les déboursés auxquels le mandat aura donné lieu, pourvu que le mandataire n'ait pas par sa faute déboursé plus qu'il ne falloit : *Mandator debet refundere mandataris quidquid ei inculpabiliter cæbet ex causâ mandati*, comme nous l'avons établi in *Pand. Justin. tit. Mand. n. 55. et seq.* Or, le paiement qu'à fait le banquier de la somme entière qui, par la falsification de la lettre, paroissoit être portée dans la lettre qu'on lui a présenté, est un déboursé auquel le mandat du tireur a donné lieu ; et l'on ne peut en cela reprocher aucune faute à ce banquier, puisqu'on suppose que la falsification étoit telle, qu'elle pouvoit surprendre un homme intelligent : le tireur ne peut donc pas se dispenser de rembourser le banquier sur qui il a tiré la lettre, de la somme entière qu'il a payée ; sauf au tireur à exercer l'action du banquier, *conditionem indolenti*,
contre

In *Scholey v. Ramsbottom* (a), a cheque drawn by a customer upon his bankers, and which he afterwards cancelled by tearing it into several pieces, was paid by them under

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contre le porteur de la lettre, pour la répétition de ce qu'il a reçu de plus que la somme qui étoit véritablement portée par la lettre. Si ce porteur de la lettre est un homme insolvable, c'est le tireur qui doit souffrir de cette insolvabilité, puisque son mandataire n'est pas en faute.

On peut dire au contraire en faveur du tireur, qu'il ne faut pas confondre ce qu'il en a coûté au mandataire pour l'exécution du mandat, *ex causâ mandati*, avec ce qu'il lui en a coûté à l'occasion du mandat, *non ex causâ mandati, sed tantùm occasione mandati*. Ce qu'il en coûte *ex causâ mandati*, est tout ce qui tend à l'exécution du mandat. Par exemple, si je vous ai chargé d'aller visiter une terre que je voulois acquérir, les frais de voyage, les salaires que vous avez payés aux ouvriers dont vous vous êtes fait assister, et autres choses semblables, sont des déboursés qui tendoient à l'exécution du mandat dont je vous ai chargé, et qui sont faits *ex causâ mandati*: ce n'est que de ces choses que je suis censé, par le contrat de mandat intervenu entre nous, m'être obligé de vous rembourser. Mais, si vous avez été attaqué en chemin par des voleurs qui vous ont volé, je ne suis pas obligé de vous indemniser de cette perte; car, quoique ce soit à l'occasion de mon mandat dont vous vous êtes chargé, que vous l'avez soufferte, et que vous ne l'eussiez pas soufferte sans cela, néanmoins ce n'est pas pour l'exécution de mon mandat, mais seulement à l'occasion de ce mandat, qu'il vous en coûte ce qu'on vous a volé; c'est par un cas fortuit, dont on ne peut pas dire que j'ai voulu m'obliger de vous indemniser, puisqu'il n'a pas même été prévu: *Non omnia quæ impensurus non fuit, mandatori imputabit; veluti quod spoliatus sit à latronibus. . . . nam hæc magis casibus quàm mandato imputari oportet*; L. 26. sect. 6. *Mandat*. Ces principes s'appliquent naturellement à l'espèce proposée. Lorsque le banquier sur qui j'ai tiré une lettre de change de cent livres, trompé par la falsification de la lettre, paie trois cent livres au porteur de la lettre, le paiement qu'il a fait de la somme de deux cents livres de plus qu'il n'est porté par la lettre, n'est pas un paiement qu'il fasse *ex causâ mandati*, en exécution du mandat dont je l'ai chargé; on peut seulement dire qu'il l'a fait à l'occasion du mandat: la falsification de la lettre, qui l'a induit en erreur, et qui lui a causé la perte de la somme qu'il a induement payée, est un cas fortuit qui n'a ni été, ni pu être prévu, et dont on peut dire par-conséquent que j'aie voulu me charger de le dédommager.

(a) 2 Camp. 485.

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against
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under circumstances which ought to have excited their suspicion, and induced them to make inquiries before paying it; and it was held that they could not take credit for the amount. Here the bankers have been guilty of negligence. The drawer of a bill of exchange has not

Cependant si c'étoit par la faute du tireur que le banquier eût été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications; puis, s'il avoit écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté zéro; le tireur seroit en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu; et c'est à ce cas qu'on doit restreindre la décision de Scaccia.

Pothier then shews, that the distinction between losses sustained by the employée in the course of his employment or order, without any default of the employer, and those losses to which the employer has given occasion by his default, is warranted by the civil law. The following case is put: If I employ you to buy a certain slave, and the slave, after you have bought him, but before you have sent him to me, robs you, there, according to one opinion, I am bound to indemnify you only if I knew the slave to have been a thief, because, in that case, I was in fault for not informing you; according to another opinion, whether I knew it or not, because I was guilty of negligence in not enquiring into the previous habits of the slave. He then proceeds thus:

Lorsque c'est la faute du mandataire qui a donné lieu au dommage qu'il a souffert à l'occasion du mandat, il n'est pas douteux qu'il ne peut pas demander à en être indemnisé; *d. L. 6. sect. 7.*

Il résulte de tout ceci qu'on ne doit pas décider indistinctement que le tireur doit indemniser le banquier de la perte que lui a causée l'erreur en laquelle l'a induit la falsification de la lettre, et qu'on doit décider au contraire que le tireur n'est tenu de cette indemnité que dans le cas auquel, par quelque faute de sa part, ou par celle de son facteur, il auroit donné lieu à cette falsification, faute d'avoir, en écrivant la lettre, pris les précautions qu'il pouvoit prendre pour la prévenir.

Dans le cas même où le mandant n'auroit pas eu le soin de prendre ces précautions, le mandataire ne pourra pas répéter du tireur ce qu'il a payé de plus que la somme qui étoit véritablement portée par la lettre, si la falsification pouvoit s'apercevoir avec quelque attention; car en ce cas, c'est la faute du banquier de n'avoir pas bien examiné la lettre qui lui a été présentée; et il n'est pas recevable, suivant les principes ci-dessus, à demander l'indemnité d'une perte à laquelle il a donné lieu par sa faute.

any

any means of discovering whether the instrument which he issues to the world be subsequently fraudulently altered; the banker has some means, and if he is deceived, must be responsible.

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Goulburn contra. This case is one of novelty and great importance to bankers, who, if the defendants are held liable, will be exposed to constant hazard without any means of prevention. For if the signature to a check be genuine, a banker is bound at his peril to pay it, although (as frequently occurs,) every other part of it be written in a strange hand. And now it is contended that after he has ascertained the signature to be valid, he is further bound to notice any alteration in the body of the cheque itself, however minute, or however skilfully effected. It is said that any material alteration in instruments of this nature after they are drawn will render them void, but that is too broad a position. In *Kershaw v. Cox* (a) a most material alteration in a bill of exchange, viz. the insertion of the words "or order," was held by Lord *Kenyon* not to vitiate the bill. And as to an alteration in the sum for which the bill is drawn, *Scacchia's* authority, as cited by *Pothier* in the passage referred to, is express that in a case like the present the drawer, and not the drawee, must bear the loss: although *Pothier*, after stating the arguments on both sides, inclines himself to the contrary opinion. As to a supposed analogy between deeds and bills, Mr. Justice *Buller* in *Master v. Miller* (b) denies that there is any such, and states conclusive reasons for his opinion; and it is clear that such an alter-

(a) 3 *Esp. N. P. C.* 246.(b) 4 *T. R.* 320.

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ation in a deed as that which took place in the bill in the case of *Kershaw v. Cox* (a) would have made the deed void. No argument, therefore, can be derived from such analogy. In *Scholey v. Ramsbottom* there was every thing to cause inquiry and suspicion on the part of the bankers. The check had been torn in four pieces, and pasted together again, and when presented was obviously defaced and dirty, which was the express ground of Lord *Ellenborough's* decision: whereas here it is found that the check "was altered in such a manner that no one in the ordinary course of business would have observed it," which makes the whole difference, and converts that case into a strong authority for the defendants. Then as to negligence, it is here altogether on the side of the customer. Giving, or rather lending, as he did this check for so trifling an amount to another person for the purpose of being sent again to a third in the country, was in direct violation of the compact which must be implied between banker and customer; viz., that the latter shall not send abroad his name and signature in this unguarded mode, but shall use them only with due caution, and for the bonâ fide purpose of drawing out his funds for his own occasions. In *Russell v. Langstaff* (b) it was holden that a person signing his name to a blank stamp was liable for any sum afterwards inserted thereon. In that case it was argued (as in this,) that a note so filled up was *not the note* of the party who had signed the blank stamp; but it was held by the Court, that a man thus sending abroad his name and signature, must be responsible for all the consequences. So here the plaintiffs have

(a) 3 *Esp. N. P. C.* 246.(b) 2 *Doug.* 514.

thought

thought fit to lend their name, owing nothing to the party to whom the check was given, and being told by him at the time that it was not for his own use, and that he should not present it for payment. Under these circumstances it follows, that the plaintiffs must bear the loss, and not the bankers, who were not guilty of any negligence, and could not by any care or caution on their part detect the imposition.

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 HALL
 against
 FULLER.

ABBOTT C. J. I am of opinion that the plaintiffs are entitled to recover. Bankers can only charge their customers with sums of money paid pursuant to order. Here, unfortunately, the bankers have *paid* more than the order authorised them to do; for by that they were directed to *pay* no more than 3*l*. I have no doubt the bankers cannot charge their customer beyond that sum. The plaintiffs are therefore entitled to the judgment of the Court for the excess.

BAYLEY J. The banker, as the depository of the customer's money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer, and to justify the payment, he must shew that the order is genuine, not in signature only, but in every respect. This was not a genuine order, for the customer never ordered the payment of the money mentioned in the check.

Judgment for the plaintiffs. (a)

(a) See *Forster v. Clements*, 2 Camp. 17.

1826.

Tuesday,
June 13th.Sissons *against* Dixon and Others.

Where, in case against a carrier for the loss of goods delivered to him at *Dublin* to be conveyed to *Liverpool*, it was objected for the defendant, that unless the goods were proved to be duly entered at the custom-house, the importation was illegal, and the contract with the carrier void: Held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered.

CASE against the defendants, as common carriers from *Dublin* to *Liverpool*, charging them with the loss of a parcel delivered to them by the plaintiff at *Dublin*, to be carried to *Liverpool*. There was a count charging them as warehousemen, and a count in trover. Plea, the general issue. At the trial before *Hullock B.* at the *Lancaster Spring* assizes 1826, it appeared that the plaintiff was a lace manufacturer at *Liverpool*, and being at *Dublin*, delivered a parcel, containing a quantity of lace, to the defendants at their warehouse, to be forwarded to *Liverpool* by the *St. George* steam packet, of which the defendants were owners. The parcel was never delivered, although often demanded. For the defendants it was contended, that the plaintiff should have proved that the goods were duly entered according to the requisites of the 46 G. 3. c. 87. s. 1. The learned Judge reserved the point, and the plaintiff had a verdict for the value of the parcel, subject to a motion to enter a nonsuit. A rule for that purpose was granted in *Easter* term, against which

Henderson shewed cause, and contended, first, that the provision of the 46 G. 3. c. 87. s. 1. as to entering goods imported from *Ireland*, was superseded by the 4 G. 4. c. 72. ss. 6. and 7., the Lords of the Treasury having exercised the power thereby given, and made the *Irish* trade a coasting trade, as appeared by *The Gazette* 25th September 1824, and consequently that those things only

only were required to be entered which were liable to duties. That the lace in question was not liable to duty, for that it must be taken to have been manufactured by the plaintiff and imported into *Ireland*, and, therefore, was entitled to a drawback on re-importation by the 56 G. 3. c. 83. s. 3. Secondly, that if the goods did require entry, there was no proof of any fraudulent intention, and without that the contract with the defendants was not void, *Catlin v. Bell*. (a) Thirdly, that the defendants ought to have proved that the goods were not entered; for the Court would not without evidence presume that the plaintiff had acted illegally, *Williams v. East India Company* (b), *Pearce v. Whale*. (c)

1826.

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against
Dixon.

J. Williams contra. The agreement in this case had a tendency to violate the provision of an act of parliament, and, therefore, cannot be enforced, *Law v. Hodson* (d), *Ribbans v. Crickett*. (e) [*Holroyd J.* The argument upon that point is irrelevant, if it was incumbent upon you to prove the illegality of the transaction.]

BAYLEY J. I am of opinion that this rule must be discharged. The presumption always is, that a party complies with the law. The means of proving the contrary were in this case within the power of the defendants, if the fact were as suggested; and as no proof was given that the goods were not duly entered, that ground of defence fails. The case of *Bennett v. Clough* (f) is very similar to the present. It was an action against a

(a) 4 *Camp.* 183.(b) 3 *East*, 192.(c) 5 *B. & C.* 38.(d) 11 *East*, 300.(e) 1 *B. & P.* 264. Upon this point see *Johnson v. Hudson*, 11 *East*, 180.(f) 1 *B. & A.* 461.

1826.

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 BISSONS
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carrier for losing a parcel containing some bank notes, stamps, and a letter. For the defendant it was said, that the 42 G. 3. c. 81. s. 5. made it illegal to send a letter in a parcel, and that the plaintiff, therefore, could not recover. But there is a proviso in that section, that it shall not extend to any letter concerning goods, sent by a common carrier of goods, to be delivered with the goods to which it relates; and the Court held, that inasmuch as illegality is never presumed, the defendant should have given *prima facie* evidence that the letter did not concern the stamps with which it was sent.

Rule discharged.

Tuesday,
 June 13th.

HIGGINS *against* WOOLCOTT.

Where an attorney's bill is reduced on taxation by a sixth part, the client is entitled to the costs of taxation. They are not in the discretion of the Court.

AN attorney's bill having been referred to the Master to be taxed, he struck off more than one-sixth, and allowed the client the costs of the taxation. A rule for reviewing that allowance was afterwards obtained upon affidavits of special circumstances, justifying the charges made in the bill.

Archbold shewed cause, and contended that by the stat. 2 G. 2. c. 23. s. 23. the client was entitled to the costs of the taxation. The words are, "and the said respective courts are hereby authorized to award the costs of such taxations to be paid by the parties, according to the event of the taxation of the bill; that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less (a), the

(a) The words "by a sixth part" appear to have been omitted.

Court

Court in their discretion shall charge the attorney or client in regard to the reasonableness or unreasonableness of such bill."

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Abraham, contra, relied upon the case of *White v. Milner (a)*, as shewing that the Court may exercise a discretion as to the allowance of costs in such cases. There the bill was reduced more than one-sixth, not by deductions from particular items, but by the disallowance of the costs of two actions, said to have been defended upon the credit of the client, and the Court held that he was not entitled to the costs of the taxation.

ABBOTT C. J. I think that the words of the statute are imperative in this case. They provide, "that where the bill taxed is less by a sixth part than the bill delivered, the attorney *is to pay* the costs of the taxation." Here the bill was reduced on taxation more than one-sixth.

Rule discharged.

(a) 2 H. Bl. 357.

The KING *against* TREMEARNE.

Wednesday,
June 14th.

AN indictment for perjury having been preferred against the defendant, and afterwards removed into this Court by certiorari, at the instance of the prosecutor, Where a true bill for perjury was found, and the Judge at the assizes having refused to try it on account of manifest imperfections in the record, a new bill was preferred, whereupon the defendant was found guilty, but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred a new indictment (for the same offence), and removed it into this court by certiorari, the Court refused to stay the proceedings upon that indictment until the prosecutor paid the costs of the former proceedings.

cutor,

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cutor, *R. Bayly* obtained a rule nisi to stay the proceedings, until the costs of two former indictments for the same offence were paid by the prosecutor. The affidavit on which the motion was founded stated, that at the *Cornwall* Summer assizes 1823, an indictment for the same alleged perjury was preferred, and found a true bill, and afterwards removed into this Court by certiorari. The record was taken down for trial at the Summer assizes 1824, when *Garrow B.* refused to try it, on account of some manifest imperfections in the record. A new indictment was thereupon preferred, and in like manner removed into this Court, and tried at the Summer assizes 1825, when the defendant was found guilty; but a new trial was granted by this Court, on the ground that a minor, not named in the panel or summoned on the jury, appeared and served instead of his father, who was in the panel. (a) The prosecutor did not carry down that record again, but at the Spring assizes 1826 preferred a new indictment, and removed it into this Court, whereupon the present motion was made.

Langslow shewed cause, and contended, that even if the Court had jurisdiction to interfere, the defendant had not made out any case entitling himself to the costs of the former prosecution. He was convicted on the only trial that has taken place, and as a second trial is to be had at his instance, it can be no hardship upon him to be tried on a new indictment, founded upon the old charge.

Bayly, contra, contended, that the new indictment must be considered as in the nature of an amendment;

(a) Ante, 254.

and

and that, therefore, the prosecutor, whose default made the amendment necessary, ought to pay the expences occasioned by his blunder. *Jones v. Davies* (a) establishes that where proceedings are removed by certiorari into this Court it has jurisdiction over the costs.

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—
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Per Curiam. No case of oppression has been made out by the defendant. His application for a new trial has made further expences necessary, and it can make no difference to him, as to such expences, whether he is again tried upon the old or upon a new indictment.

Rule discharged.

(a) 1 B. & C. 143.

FREE *against* MASON.

Wednesday,
June 14th.

A LATITAT was sued out against the defendant, returnable the first return of *Easter* term, and duly served. Some negotiation then took place, the defendant undertaking to give security for the debt, and at his request proceedings were stayed. No security having been given, the plaintiff after the essoign day of *Trinity* term entered an appearance, and filed common bail for the defendant, filed a declaration, and gave notice to plead in four days. No plea having been pleaded, the plaintiff signed judgment.

Where an appearance is entered for a defendant, and a declaration filed pursuant to the 12 G. 1. c. 29., no demand of plea is necessary.

Abraham obtained a rule to set aside the judgment for irregularity, on the ground that a plea had never been demanded.

F. Pol-

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FREE
against
MASON.

F. Pollock shewed cause, and contended that, according to *Palk v. Rendle* (a), no demand of plea was necessary.

ABBOTT C. J. It is a settled rule of practice, that where a declaration is filed in pursuance of the statute 12 G. 1. c. 29. a demand of plea is unnecessary.

Rule discharged.

(a) 8 T. R. 465.

Wednesday,
June 14th.

DOE *against* ROE.

Where a declaration in ejectment was left at the house of the tenant in possession on Saturday, and the tenant afterwards acknowledged that he received it on the following Sunday, (which was before the essoign day): Held, that this was not good service.

WHITEHEAD moved for judgment against the casual ejector upon an affidavit stating that the declaration was left at the house of the tenant in possession on the 20th of May, and that the tenant after the essoign day of this term acknowledged that he received the declaration on Sunday the 21st of May, the day preceding the essoign day.

Per Curiam. Service of the declaration on a Sunday by the lessor of the plaintiff upon the tenant in possession would not be good service; and there does not appear to be any reason why he should be in a better situation if the declaration comes to the hands of the tenant on that day by the act of a third person.

Rule for judgment refused.

1826.

FREE, D. D. *against* BURGOYNE.*Wednesday,*
June 14th.

A CONSULTATION having been awarded in this case in *Easter* term (a), the plaintiff sued out a writ of error to the Exchequer Chamber, and obtained an allowance thereof, which was served upon the defendant's attorney on the 9th of *May*. The writ of consultation was issued and presented to the Court below on the 10th of *June*, whereupon the plaintiff obtained a rule nisi to quash that writ, on the ground that the writ of error was a supersedeas. After hearing *Campbell* against the rule, and *Denman* in support of it,

In prohibition,
a writ of error
does not lie
from K. B. to
the Exchequer
Chamber.

The Court held, that the statute 27 *Eliz. c. 28.* did not extend to this case, and that no writ of error lay to the Exchequer Chamber.

Rule discharged. (b)

(a) See p. 400.

(b) Suits in prohibition are not mentioned amongst those in which the 27 *Eliz. c. 28.* gives a writ of error to the Exchequer Chamber; and the writ of prohibition is an original writ out of Chancery. See *Jefferson v. Bishop of Durham*, 1 B. & P. 121. *Croucher v. Collins*, 1 *Saund.* 136. (1). *Jaques v. Cesar*, 2 *Saund.* 101. (1).

1826.

HERBERT *against* TAYLOR.

Upon a general demurrer to a plea of nil debet to an action upon a bond, the Demurrer Book is to be made up by the plaintiff's attorney, and not to be filed with the clerk of the papers.

THIS was an action on a bond. The defendant pleaded the general issue nil debet, and delivered it to the plaintiff's attorney. The plaintiff demurred generally to that plea, and his attorney delivered the issue on the demurrer to the defendant's attorney, without filing the demurrer with the clerk of the papers, and obtained a rule for a concilium, and for judgment on the demurrer. A rule nisi had been obtained for setting aside the concilium and the delivery of the issue, on the ground that the demurrer ought to have been filed with the clerk of the papers.

Marryat and *Archbold* now shewed cause. The rule is, that all special pleas and special demurrers shall be filed with the clerk of the papers, but that general pleas and general demurrers shall be delivered by the attornies. In the edition of the rules of court published in 1747, by Sir *George Cooke*, the prothonotary of the Court of Common Pleas, there is the following note to the rule of court of *Trinity* 12 *W.* 3.: "The attornies of this court make up the Issue and Demurrer Books in the following cases, viz. every issue that may be given on the book side; not guilty to a new assignment; the bar of son frank tenement; comperuit ad diem to a sheriff's bond; nul tiel record to an action of debt on a judgment; a general demurrer to a declaration; in covenant, where the defendant in his bar concludeth to the country; every special non est factum, every

every son assault demesne, and likewise all issues and demurrers upon writs of error, scire facias, and audita querela, and all repleaders or other things formerly entered of record. In all other cases, both by bill and original, the *special* pleadings are to be left with the clerks of the papers, who make copies thereof, and when issue is joined, the paper books are made up by them." Although a general demurrer to the general issue is not expressly mentioned as an instance where the Demurrer Book may be made up by the attorney, yet it is evident that the distinction is between general and special pleas and demurrers, and a general demurrer to a declaration not only may, but must be delivered. Filing it is irregular if the plaintiff does not know of it. Ruled *Hilary*, 1817. *Archbold's Practice*, p. 6.

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against
TAYLOR.

Chitty contra. In the note to the rule of Court of *Hilary* term, 1 *W. & M.*, edit. 1795., the cases already mentioned are enumerated as those where the attornies are to make up the issue or demurrer book. The note then proceeds, "in all other cases, both by bill or original, the pleading must be filed with the clerk of the papers," and this rule is adopted in *Crompton's Practice*.

ABBOTT C. J. We are of opinion that the attorney was at liberty to make up and deliver the Demurrer Book in this case. This rule must therefore be discharged.

Rule discharged.

Archbold then moved for judgment for the plaintiff, which was granted.

1836.

Jones against Gibson and Smith.

One of several joint defendants may obtain a rule for judgment, as in case of nonsuit.

THIS was an application by the defendant *Smith* for judgment as in case of a nonsuit. The defendants pleaded the general issue by separate attorneys, and *Smith* was joined in *Mistakenly* term last, and notices of trial given for the sittings after *Hilary* term. The objection to the rule was, that one of two joint defendants cannot move for judgment as in case of a nonsuit.

The matters of the rule having been referred to the Master, he, after stating the facts, made the following report:

By statute 14 G. 2. c. 17. which authorizes the application to the Court for judgment as in case of a nonsuit, it is provided that all judgments given by virtue of that act shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect.

In the absence of any authority upon this point, I apprehend if this case had gone down to trial, and either of the defendants had appeared by his counsel, the plaintiff might have been called and nonsuited. I am, therefore, of opinion that the defendant *Smith* is entitled to have the rule made absolute for judgment as in case of a nonsuit, and which will authorize a general judgment of nonsuit to be entered against the plaintiff.

The Court concurred in that opinion, and made the Rule absolute.

1826.

GLOVER *against* WATMORE.

IN this case the process was returnable on the 20th of *April*. On the 21st the defendant's attorney obtained an order for the particulars of the plaintiff's demand. On the 22d of *April* a declaration in debt was filed *de bene esse*, and notice of the same was left at the defendant's place of abode. A particular of the plaintiff's demand was delivered to the defendant's attorney on the 2d of *May*. On the 3d of *May* common bail was filed for the defendant according to the statute. The defendant's attorney, on the 2d of *May*, took out a summons for better particulars of the plaintiff's demand, and on the same day served a copy of the summons on the plaintiff's attorney, which the latter did not attend. On the 3d of *May* a second summons was taken out and served, and as the plaintiff's attorney did not attend, a third summons was taken out, which he did attend on the 5th of *May*, when the order was refused. Immediately after this summons was discharged, judgment was signed for want of a plea, and the plaintiff sued out a *ca. sa.*, of which the defendant's attorney had notice on the 8th of *May*. Gurney had obtained a rule nisi for setting aside the judgment, and the execution issued thereon, for irregularity, on the ground that the defendant had four days to plead from the return of the last summons, and that the plaintiff was not entitled to sign judgment till the 9th of *May*.

A summons for better particulars of the plaintiff's demand was obtained by the defendant four days before the time for pleading expired. The plaintiff's attorney did not attend till the third summons, and the order being then refused, and the time originally allowed for pleading having expired, signed judgment for want of a plea: Held, that as the delay was occasioned by the plaintiff's attorney, the judgment was signed too soon, and was therefore irregular.

Archbold now showed cause against this rule. Where the proceedings are stayed by the defendant beyond the time at which he would otherwise be obliged to take the

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next step, he must take that next step immediately on the rule or summons being disposed of, *St. Hanlaire v. Byam*. (a)

ABBOTT C. J. The rule laid down in that case is correct; but in this case the principal delay was created by the plaintiff, first, in not delivering the bill of particulars until the 2d of *May*, although the order for it was obtained on the 21st of *April*; and, secondly, in not attending the first or second summons for better particulars. We are of opinion, that the judgment was signed too soon, and consequently was irregular. This rule must, therefore, be made absolute.

Rule absolute. (b)

(a) 4 B. & C. 970.

(b) HUGHES v. WALDEN, *Hilary Term*, 1827.

The defendant was arrested on the 8th of *November* 1826, on a *latitat* returnable the 15th. The time for putting in bail expired on the 17th. On the 17th the defendant obtained and served a rule to show cause why the bail bond should not be delivered up to be cancelled on the ground of misnomer; which rule was discharged with costs on the 25th. At a quarter before seven o'clock in the evening of the 25th, the plaintiff's attorney served a copy of the rule by which the rule nisi was discharged on the defendant's attorney, and then took an assignment of the bail bond, and sued out process against the bail. In a short time afterwards, in the same evening, the defendant's attorney put in bail, and served the plaintiff's attorney with notice. A rule nisi had been obtained by *Chitty*, for setting aside the proceedings on the bail bond for irregularity, with costs, upon the ground that the rule nisi suspended the proceedings for all purposes until the rule was disposed of, *Swayne v. Crammond* (4 T. R. 176.), and therefore that the time for putting in bail, for pleading, or the like, remained the same when the rule was discharged as when granted; and, consequently, that the defendant in this case having had the whole day on which he obtained the rule nisi to put in bail, had the whole of the day on which the rule was discharged for the like purpose.

Archbold contra. Although the rule nisi suspended the plaintiff's proceeding while it was pending, the defendant was bound to put in and give notice of bail *instanter* after the rule was discharged, *St. Hanlaire v. Byam* (4 B. & C. 790.)

Abbott

ABBOTT C. J. When a defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled (as contended for) to the same time for the purpose of taking the next step, as he had when he obtained the rule. But we think that a defendant in such a case should have a reasonable time allowed him for the purpose of taking his next proceeding; and we think that the whole of the day on which the rule is disposed of, such a reasonable time. As this, however, is a rule of practice now for the first time laid down by the Court, we think, that although this rule should be made absolute, it should not be made absolute without costs.

1826.

Rule absolute, without costs.

DOE on the joint and several Demises of
SAMUEL OVERING AUCHMUTY and Two Others,
against JULIANA MULCASTER, Widow, RICHARD
TYLDEN and JANE his Wife.

EJECTMENT for premises in the parish of *Ospringle*, in the county of *Kent*. Plea, Not guilty. At the trial before *Best C. J.*, at the *Kent Summer* assizes, 1825, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case: The premises in question are of gavelkind tenure. The late *Sir Samuel Auchmuty*, deceased, in *August* 1822 died, seised thereof, unmarried, and without issue, and intestate as to that property. He was the youngest son of *Samuel Auchmuty*, who was the son of a *British* born father and mother, and was born in *Massachusetts* in *North America*, then a colony of *Great Britain*, was rector of *Trinity Church* in the city of *New York*, in the state of *New York* in *North America*, at that time also a colony of *Great Britain*, and died there prior to the recognition of the independence of the *United States of America* by *Great Britain*; and at the time of his death was a *British* subject. The said *Samuel*, the father, left issue him surviving, by his wife,

Children born in the United States of *America* since the recognition of their independence, of parents who resided there before, but who were natural-born *British* subjects, and at the time of the separation of the two countries adhered to the *British* government, are not aliens, and are capable of inheriting lands in this country.

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(an *English*-born subject,) three sons; namely, *Robert Nicholls*, who was the eldest, *Richard*, and the said Sir *Samuel*, who so died seised of the premises in question; and three daughters; namely, the above-named defendant *Juliana*, now the widow of *Frederick Mulcaster*, the above named defendant, *Jane*, now the wife of the said *Richard Tylden*, and *Isabella*; all which issue were born in the province of *New York* before the declaration by the *American* states of their independence, and before the recognition thereof. *Richard* and *Isabella* died before Sir *Samuel*, without leaving issue. *Robert Nicholls Auchmuty* resided in the province of *New York* during the revolutionary war, within the *British* lines, and at that time served as an officer in, and afterwards for some time commanded a volunteer company of militia, called the governor's company, in aid of the royal cause in the said war, and bore arms against the United States until the peace hereinafter mentioned. *Robert Nicholls Auchmuty* being an *American* loyalist, still adhering to his then majesty as his subject, embarked with the *British* troops when they evacuated *New York*, pursuant to the treaty of peace between *Great Britain* and the United States of *America*, concluded in *September* 1783, and arrived with the said *British* troops in *England*, and he continued to reside in *England* for about two years after his arrival therein as aforesaid. Whilst he so resided in *England*, he was duly appointed by the *British* government secretary to a board of commissioners in pursuance of the said treaty of peace made in *September* 1783, which board sat in the city of *New York*; and he went from *England* to *New York* in the year 1785, under and by virtue of that appointment. After the determination of his employment under the *British* government, he settled in the United States of *America*,

America, married a *British* born subject, and had children, and continued to reside there until the time of his death, which took place in the year 1812. At the time of his death *Robert Nicholls Auchmuty* left issue male four sons; viz., the three lessors of the plaintiff, and *Robert Mulcaster Auchmuty*, all of whom were born in the United States of *America* subsequent to the recognition by *Great Britain* of the independence of that country, and after *Robert Nicholls Auchmuty* went to *New York* under the said appointment as aforesaid. The four sons of the said *Robert Nicholls Auchmuty* all survived Sir *Samuel Auchmuty*, who so died seised of the premises in question. *Robert Mulcaster Auchmuty* died about the month of *November* 1822 at *Madras*, without leaving any widow or issue, and without making any will to pass real estates. The lessors of the plaintiff in this action are the next heirs in gavelkind of Sir *Samuel Auchmuty* who died so seised, if they can by law inherit the said premises from the said Sir *Samuel Auchmuty*. The colony of *New York*, with other colonies in *North America*, separated themselves from the government and crown of *Great Britain* and united themselves together, and on the 4th of *July* 1776, declared themselves free and independent states by the name and style of "The United States of *America*." On the 3d of *September* 1783, his late majesty acknowledged the United States of *America* to be free, sovereign, and independent states, and on the said 3d day of *September* a definitive treaty of peace was signed between his said majesty and the United States of *America*, which said treaty is as follows; (the special case then set out the first, third, fourth, fifth, sixth, and seventh articles of the treaty, for which see *Doe d. Thomas v. Acklam. (a)*)

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(a) 2 B. & C. 779.

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 ———
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 against
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Chitty for the lessors of the plaintiff. The decision to which this Court came in *Doe v. Acklam* is decisive of the present question, for this case is precisely the converse of the former. There the parent of the claimant did not join either party at the time of the war with *America*, but continued to reside there during the war, and at the time of the treaty made with this country (whereby the independence of the United States was recognized), and thenceforth until his death. That was considered as an election to become a citizen of *America*, and to put off his allegiance to this country. In the present case, it is clear that the father of the lessors of the plaintiff, at the time of the treaty, elected to continue a *British* subject, and he could not afterwards, even if he had wished so to do, get rid of that character. The present claimants are, therefore, clearly within the 4 G. 2. c. 21. being born of a father who at the time of their birth was a natural-born subject of this country. Should it be said that the case is altered by the circumstance of the father's being born in *America*, that is completely answered by the case of *Bacon v. Bacon*. (a)

Abraham contra. The lessors of the plaintiff are not capable of inheriting lands in this country. They were born in the United States of *America*, after the independence of those States had been recognized; and being born of parents *settled* there, must be considered aliens. In *Calvin's* case (b), an alien is defined to be a subject that is born out of the legiance of the king, and under the legiance of another; and this definition is adopted in *Com. Dig. Alien* (A). If then the lessors of the plaintiff were aliens born, they cannot hold lands here,

(a) *Cre. Car.* 601.

(b) 7 Co. 31.

although

although their parents were natural born, *Co. Lit.* 8 a. In the 29 *Car.* 2. (a) a statute was passed to naturalize the children of his majesty's *English* subjects born in foreign countries during the protectorate. The 7 *Anne*, c. 5. was made in *pari materia*, and each of them was intended to apply to cases where the children were born abroad, of parents who had gone there for temporary purposes, and not to make the foreign country their permanent abode, as was the case of the parents of the present claimants. The 4 *G. 2.* c. 21. was merely intended to restrain and not to enlarge the operation of the 7 *Ann.* c. 5.

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ABBOTT C. J. It is not found that *Robert Nicholls Auchmuty*, the father of the lessors of the plaintiff, was at the time of the treaty in 1785, adhering to the United States. The facts stated prove the reverse, and bring the case directly within the stat. 4 *G. 2.* c. 21. The plaintiff is therefore entitled to recover.

BAYLEY J. There is a very plain distinction between this case and that of *Doe v. Acklam*. In that case it appeared that the parent, through whom the claim was made, put off his allegiance at the time of the treaty which enabled him so to do. Here *Robert Nicholls Auchmuty* took no such step at that time, and the law did not enable him to do so at any future time. He was, therefore, when residing in *America* after the treaty, in the same situation as if he had gone to reside in any other foreign country, and his children are expressly within the stat. 4 *G. 2.* c. 21. and entitled to the privileges of natural-born subjects of the king of *England*.

(a) c. 6.

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HOLROYD J. The statutes 7 *Ann. c. 5.* and 4 *G. 2. c. 21.* clearly give to the children of *R. N. Auchmuty* inheritable blood, although they were not born within the legiance of the king.

Postea to the plaintiff.

SAMUEL BODDINGTON *against* JOHN ABERNETHY.

Where copyholder in fee surrendered to the uses of a prior settlement, which contained a power to revoke the uses therein declared, and limit new ones: Held, that uses limited in execution of this power were good, although they had the effect of defeating prior vested estates.

THE following case was sent by the Master of the Rolls for the opinion of this Court :

At the time of the making of the indenture of lease and release next hereinafter mentioned, *Ann Forbes*, spinster, party thereto, was seised for an estate of inheritance, in fee-simple, of certain freehold manors, messuages, lands, tenements, and hereditaments thereby conveyed. She was, also, at that time seised for an estate of inheritance in fee-tail, at the will of the lord, and according to the custom of the manor of *Enfield*, of certain copyhold messuages and hereditaments with the appurtenances in the said indenture mentioned, situate within, and parcel of the manor of *Enfield*, and demised and demisable by copy of court roll of the said manor to any person or persons willing to take the same, in fee simple or otherwise, at the will of the lord, and according to the custom of the said manor. By lease and release bearing date respectively the 27th and 28th days of *June* in the year 1785, (being the settlement made previously to the marriage of *Ann Forbes* with *William Raymond*,) the release being duly made and executed between and by *Ann Forbes* of the first part, *William Raymond* of the second part, *James Raymond* the elder
of

of the third part, *Thomas Fuller* and *James Raymond* the younger of the fourth part, *John Raymond* and *Thomas Hall Fiske* of the fifth part, and *John Wolf* and *Thomas Hall* of the sixth part, in consideration of the said then intended marriage, and other the considerations therein mentioned, the said freehold hereditaments of which *Ann Forbes* was seised in fee, were granted and released by her, with the privy and consent of *William Raymond*, unto *Thomas Fuller* and *James Raymond* the younger, and their heirs and assigns, to hold the same unto *Thomas Fuller* and *James Raymond* the younger, their heirs and assigns, to the use of *W. Raymond* for life, and to certain other uses therein specified. And by the said indenture of release it was provided, agreed and declared by and between all the said parties thereto, that it should be lawful for *Thomas Fuller* and *James Raymond* the younger, or the survivor of them, or the heirs of such survivor, at any time or times thereafter, at the request, and with the consent and approbation of *William Raymond* and *Ann Forbes* his intended wife, or of the survivor of them, during their lives, and the life of the survivor of them, (such request, consent, and approbation to be testified in manner therein specified,) to dispose of and convey, either by way of sale for valuable consideration in money, or in exchange for or in lieu of other manors, &c. of equal value, all or any of the said manors, &c., unto any person or persons whomsoever, and that for the purpose of effecting such disposals and conveyances, but not for any other purpose, it should be lawful, if it should be thought necessary or requisite, for *Thomas Fuller* and *James Raymond* the younger, and the survivor of them, or for the heirs or assigns of such survivor, upon such request, and

with

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with such consent and approbation as aforesaid, testified as aforesaid, by any deed or instrument in writing to be sealed and delivered by them the said *Thomas Fuller* and *James Raymond* the younger, or the survivor of them, or the heirs or assigns of such survivor, in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, powers, provisoes, limitations, and agreements in the said indenture of release limited, declared, and expressed, of and concerning the said hereditaments so to be sold or exchanged, and by the same or any other deed or instrument in writing, to be so sealed, and delivered, and attested, and with such consent and approbation, and so testified as aforesaid, to limit and appoint the said hereditaments and premises whereof the uses should be so revoked, either unto the purchaser or purchasers, or to the person or persons

making such exchange or exchanges, and to his, her, and their respective heirs and assigns, or otherwise to limit, declare, direct, or appoint such new or other use or uses, estate or estates, trust or trusts of and concerning the same hereditaments and premises, as should be necessary or requisite for effecting such sale or exchange. And after further reciting in the said indenture of release, that *Ann Forbes* was so seised in fee-tail as aforesaid, of and in the copyhold messuages and hereditaments, with the appurtenances, within and parcel of the manor of *Enfield* as aforesaid, *Ann Forbes* covenanted to make such surrender, and suffer such recovery in the copyhold court of the said manor, as were necessary to extinguish her estate tail, and bar all remainders expectant thereon, and for surrendering, limiting, and assuring the same, according to the custom of the manor, to the same uses,
and

and subject to the same powers as were before limited and declared as to the freehold estates. Soon after the execution of the release the intended marriage was solemnised, and afterwards *Ann Raymond*, and her husband *W. Raymond*, surrendered to the use of *John Spelman Mannings*, to make him tenant of the said copyhold premises, in order that a recovery might be suffered according to the covenant. On the 17th of *March* 1789, *Mannings* was admitted, and a recovery was suffered according to the covenant, wherein one *F. Ruddle* was demandant, *Mannings* tenant, and *W. Raymond* and *Ann* his wife vouchees, who further vouched the common vouchee. *Ruddle* was admitted, and immediately surrendered to the uses, and subject to the powers in the indenture of release contained; and thereupon *W. Raymond* was admitted tenant for life according to that indenture. By release and appointment of the 16th of *July* 1805, made and executed by *T. Fuller* and *J. Raymond* the younger of the first part, *W. Raymond* and *Ann* his wife of the second part, *Samuel Boddington* of the third part, *James Weston* of the fourth part, the *Rev. John Raymond* of the fifth part, and *Ambrose Weston* of the sixth part, *T. Fuller* and *J. Raymond* the younger, in consideration of 1320*l.*, being a reasonable price in that behalf, to them paid by *Samuel Boddington*, with the consent and approbation, and at the request of *W. Raymond* and *Ann* his wife, testified as required by the said first-mentioned indenture of release, and by virtue of the powers thereby given, sold the said copyhold premises to *Samuel Boddington* in fee. And in pursuance of the powers to them given by the first-mentioned indenture, and the surrender, revoked the uses, &c., to which the said copyhold pre-
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mises had been surrendered, and did thereby limit and appoint that all the said copyhold premises should, immediately from and after the sealing and delivery of the said indenture of release and appointment, be and remain to the use of *S. Boddington*, his heirs and assigns; and *W. Raymond*, for himself and *Ann* his wife, did covenant with *S. Boddington*, that he would surrender or cause to be surrendered into the hands of the lord, to the use of him *S. Boddington*, his heirs and assigns, the said copyhold hereditaments. The said indenture of release and appointment of the 16th of *July* 1805, was a disposition, by way of sale, of the said copyhold hereditaments; and the same was duly signed, sealed, and delivered by all the parties thereto in the manner required by the first-mentioned indenture of release and settlement. On the 22d of *August* 1805, *W. Raymond*, according to the custom of the manor, surrendered the said copyhold premises into the hands of the lord, to the use of *Thomas Fuller* and *James Raymond* the younger, their heirs and assigns, upon the several trusts, and for the ends, intents, and purposes mentioned, expressed, and declared of and concerning the same in the said indenture of settlement of the 28th day of *June* 1785; and at a court holden in and for the manor on the 28th of *August* 1805, *T. Fuller* and *J. Raymond* the younger were duly admitted tenants to the same; habendum, unto *T. Fuller* and *J. Raymond* the younger, their heirs and assigns, at the will of the lord, and according to the custom of the manor, upon the several trusts, and for the several ends, intents, and purposes mentioned, expressed, and declared of and concerning the same in the said indenture of settlement of the 28th day of *June* 1785. Afterwards, at the same court, *T. Fuller* and
J. Ray-

J. Raymond the younger surrendered the same copyhold premises into the hands of the lord, to the use and behoof of the plaintiff *S. Boddington*, his heirs and assigns for ever; and thereupon the plaintiff *S. Boddington* was, at the same court, duly admitted tenant to the said copyhold premises, to hold the same, with the appurtenances, unto him, his heirs and assigns for ever, at the will of the lord, and according to the custom of the manor. In the month of *July* 1822, the defendant *John Abernethy* entered into a contract with the plaintiff to purchase of the plaintiff the said copyhold premises whereof the plaintiff had been so admitted tenant as aforesaid, and a bill in this cause was filed to compel a specific performance of such contract. The question for the opinion of the Court is, whether the plaintiff has an estate in fee-simple at the will of the lord, according to the custom of the said manor, in the said copyhold messuages and hereditaments, with the appurtenances.

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Tinney for the plaintiff. The question upon this case is, whether uses to arise in futuro upon contingencies, and so as to defeat prior vested estates, can be well limited in a surrender of copyhold lands. They may be so limited by deeds taking effect under the statute of uses in the case of freeholds, or by devises both of freeholds and copyholds, and in settlements of estates of either sort by way of trust. It must be admitted that the statute of uses does not affect copyholds, *Rowden v. Maltster* (a), where this reason is assigned for the exemption, "because the transmutation of possession by the sole operation of the statute without allowance of the lord, would tend to the lord's prejudice (b)," it must be

(a) *Cro. Car.* 62.

(b) As to this point see *Shep. Touch.* by *Preston* 505 (7).

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admitted also that this as a common law conveyance would not be good, and the argument for the defendant must be, that the surrender of a copyhold is a common law conveyance, and subject to the rules of the common law. But the reasons for those rules being in many instances inapplicable to copyholds, the rules themselves ought not to be applied to such estates. A future freehold could not at common law be given, because the freehold could not be transferred without livery of seisin. So also, a fee could not have been limited to a stranger in destruction of a previous fee; for no estate of freehold could at the common law be defeated, except by entry of the feoffor or his heirs for a condition broken, and such entry would have defeated the limitation over. The case of copyhold land is very different; for there the freehold always remains in the lord. Neither do the objections made to feoffments to uses before the statute apply to copyholds. The owner of the freehold is known; there can be no difficulty in making a tenant to the præcipe, or in finding out the person who is bound to perform the services. There are many cases in which copyholds may be limited in a mode not allowed by the common law as to freeholds. A husband cannot give freehold lands to his wife, or a wife to her husband, but with respect to copyholds the law is otherwise, *Brooks v. Brooks*. (a) In *Co. Copy.* 81. many other instances are given, and that book shows that copyholds may be surrendered for estates of freehold to take effect in futuro. The older authorities support that position, and others which appear to warrant a different opinion are capable of explanation. In *Allin v. Nash* (b), it was resolved, “that if a copyholder surrenders according to the custom, to the use

(a) *Cro. Jac.* 434.(b) *Noy.* 152.

of *N.* after the death of the surrenderer, that is good, notwithstanding that one cannot preserve the same estate to himself, for the estate is in the lord. And the surrenderer during his life shall take the profits, and afterwards the lord ought to admit *B.* according to the direction of the surrender." In *Paulter v. Cornhill* (a), surrender was to the use of one in fee, upon condition to pay 100*l.* to a stranger, and if he failed, that it should be to the use of a stranger in fee. The report says, that "the Court spake not much thereto, but willed to have it specially found, yet *Beaumont* conceived it to be well enough, for it shall be as an use limited upon a feoffment, and these uses shall rise out of the first surrender;" and in *Bentley v. Delamor* (b), it is said, "It is good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds; a surrender in futuro is good, for the freehold remains in the lord." The only difficulty arises from the case of *Simpson v. Sothorne*, which is reported in various books, 2 *Bulstr.* 272., *Cro. Jac.* 376., 1 *Roll. Rep.* 109. 137. 153., *Godb.* 264., 2 *Roll. Abr.* 791. The accounts of the case given by these reporters vary, but that in 2 *Bulstr.* is the fullest, and appears to be the best. It is there stated, that *R. Simpson*, being a copyholder of inheritance in fee simple, did surrender his copyhold lands (jacens in extremis) unto the lord of the manor, habendum after his death ad opus et usum of the infant, then being in ventre sa mere, and that if such infant dies without heir, within age or before marriage, then he surrenders these lands to the use of one *John Simpson* and his heirs, according to the custom of the manor.

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ANNE-METHE.

(a) *Cro. Eliz.* 361.(b) *Freem.* 267.

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the report by *Godbolt*, one ground of the decision in *Simpson v. Sotherne* was, that the remainder to *J. S.* was to begin upon a condition precedent, which was never performed. In the supplement to *Co. Copy.* 144. the case of *Simpson v. Sotherne* is mentioned, as deciding that a surrender must be to such a person, or his use, who is in esse, and capable of such a surrender, or that may take presently by force of the surrender; and on that ground the surrender to the use of the infant in ventre sa mere was held bad. Probably that was the real ground of the decision; for in *Bulstr. Coke C. J.* is made to liken the case to a devise to an infant in ventre sa mere, which he said could not be good. The law, as laid down in *Co. Copy.* 81., is, however, at variance with the decision in *Simpson v. Sotherne*. It is there said, that "in customary grants upon surrenders, the law is not so strict as in grants at the common law; for in grants at the common law, if the grantee be not in rerum naturâ, and able to take by virtue of the grant presently upon the grant made, it is merely void; but in customary grants upon surrenders the law is otherwise." And then Lord *Coke* goes on to state that a surrender to him that shall be heir of *J. S.*, or to *J. S.*'s next child, is good. On the other side, *Gillb. Tenures*, 259. may be relied on, where he approves of the decision in *Simpson v. Sotherne*, as reported in *Cro. Jac.* This is controverted in *Fearne's Cont. Rem.* 276. (a), citing *Paulter v. Cornhill*, and *Stocker v. Edwards* (b), which latter case was as follows: "A surrender of a copyhold tenement was made to the use of himself for life, and after to the use of *J.*, his youngest son, and the heirs of his body, if he attain to the age of eighteen years; and

(a) 6th edit.

(b) 2 Show. 396.

be given to certain words, and the majority of the Court were of a different opinion; and *Watkins* (a) admits that if that be law, surrenders are not to be construed as common law conveyances. If estates to commence in futuro may be limited on a surrender of copyholds, it seems to follow that a power may be reserved to revoke the uses declared in the surrenders, and limit others in lieu of them. It appears from the case of *Lovell v. Lovell*, that in the opinion of Lord *Hardwicke* there may be springing uses limited upon a surrender of copyholds; and in *Roe v. Griffiths* (b), *Doe v. Morgan* (c), and *Lord Kensington v. Mansell* (d), the point was not discussed; but it seems to have been taken for granted that a surrender of copyholds to certain uses, with power to the surrenderer to declare other uses by deed or will, was good. Where a surrender is made to the use of a will, it does not appear to have been ever doubted that the devisor might limit shifting or springing uses, so as to have the effect of divesting prior vested estates, *Wellcoke v. Hammond* (e), *Brian and Cawsen's* case (f), *Taylor v. Taylor* (g), *Driver v. Thompson* (h), *Doe v. Barthrop* (i), *Holder v. Preston*. (k) Now a will does not operate as a devise of copyholds, but as a declaration of the uses of the surrender; and it would be difficult to assign any good reason why uses declared in that mode should be supported, if they ought not when declared in any other instrument. In the case of freeholds, shifting or springing uses might, before the statute, be declared upon a feoffment to uses, (although a freehold could not be given to commence in futuro,) for in such

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(a) *On Copy*. vol. i. p. 112.

(c) 7 T. R. 103.

(e) Cited in *Boraston's* case, 3 Co. 20.

(g) 1 Atk. 386.

(i) 5 Taunt. 382.

(b) 4 Burr. 1953.

(d) 13 Ves. 240.

(f) 3 Leon. 115.

(h) 4 Taunt. 294.

(k) 2 Wils. 400.

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case the freehold remained in the same person. This rule applies also to copyholds, for the freehold remains in the lord. There may be some reason why words in a will of copyholds should suffice to raise such uses, which would be insufficient in a deed, because the testator is supposed to be inops consilii, but there does not appear to be any reason why that should be allowed to be done by will, which cannot be done by any form of words in a deed, each being nothing more than a declaration of uses upon a surrender. In practice copyholds were for a long series of years made the subject of such settlements as that in question; and precedents may be found in the *English Copyholder* (a), and *Horseman's Precedents*. (b) Nor was the validity of them ever questioned in modern times, until the doubt suggested in *Gilb. Tenures*, 259. was revived, in *Watkins on Copy*, c. 5. It is important that such settlements should be held good, and that parties should not be compelled to make them by way of trust; for then it is necessary to resort to a court of equity, in order to compel a performance of the trusts. Besides, the rolls of the manor are properly evidence of the copyholder's title; but the stewards will not enter trusts upon the rolls. Again, trustees may defeat the trusts by committing a forfeiture; or by accident their estate may escheat, and in either case the lord would hold by title paramount the trusts, and not subject to them.

G. R. Cross contra. The plaintiff, *S. Boddington*, has not an estate in fee-simple in the copyhold premises in question. If the power reserved in the settlement, to revoke the old and appoint new uses, be good, it must

(a) P. 385.

(b) Vol. ii. 468. Vol. iii. 426.

be admitted that it has been well executed. But it is clear that such a power would be bad with respect to common law conveyances of freeholds; and it has been frequently held that surrenders of copyholds are to be treated as common law conveyances. It is also at variance with the principles of the law relating to copyholds; for it has the effect of destroying prior vested estates; and it is a general rule, that no vested estates of copyhold can be divested, except by surrender. It is said, that the freehold remaining in the lord is sufficient to support all uses and trusts declared of the lands; and he is compared to the feoffee to uses of freeholds; but there is this important distinction in the latter case. Before the statute of uses the legal estate was in the feoffee; in the case of copyholds it is in the tenant, and not in the lord. The various incidents of copyholds of inheritance show that the legal estate is in the copyholder, and his estate is sufficient to support the trusts, so that there will be no practical inconvenience in holding the power in question to be void, for springing and executory uses may be limited by way of trust. The descent of copyholds follows the rules of the common law, *Supplement to Co. Copy.* 116, *Smith v. Triggs.* (a) So, if a devise be made to the customary heir, he is in by descent and not by the will: *Doe dem. Shewen v. Wroot* (b); and in *Doe v. Barthrop* (c), where copyholder in fee devised to R. K. and C. J., and their heirs in trust, to permit and suffer M. A. S., or her assigns, to receive the rents and profits during her life, and subject to such estate and interest of M. A. S., unto such person or persons, for such estates, &c. as M. A. S. should by deed or will appoint, it was held that the legal estate in the trustees

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(a) 1 Str. 487.

(b) 5 East, 132.

(c) 5 Trench 382.

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should be carried only so far as was necessary to effectuate the intention of the devisor, that the trust would be executed by limiting to the trustees a base fee, determinable with the life of *M. A. S.*, and that therefore the legal estate went over from them when the life estate of *M. A. S.* determined. The result of all these cases is, that the legal estate of copyholds never was fiduciary, but always remained in the copyholder; all the incidents were at common law, and enforceable in the common law courts; and it has frequently been said, that a conveyance by surrender and admittance is a common law conveyance, and subject to the rules of the common law. In *Fisher v. Wigg* (a) this was the opinion of *Holt C. J.*, although *Gould* and *Turton Js.* differed from him; and in *Idle v. Cook* (b), which occurred very few years after, the majority of the Court concurred with *Holt C. J.*, in holding, that a surrender was to be considered as a common law conveyance. In that case, *Powis J.*, in discussing the question, what words were sufficient to create an estate tail in a surrender, says: "In a conveyance at common law, *as this is*, the donor must by express words give direction from whose body the heirs inheritable are to issue." Again, in *Sutton v. Sutton* (c), it is said: "In the cases of surrenders of copyhold estates the same construction must take place, as in all other conveyances *at law*; and so held, in *Idle v. Cook*, by the whole Court (d), that a limitation of uses in a copyhold surrender must be construed by the same rules as if it were a limitation in any other conveyance at common law." The same was held by Lord *Hardwicke* in *Lovell v. Lovell*, and by Lord *Kenyon* in *Wright*

(a) 1 P. W. 14.

(b) 1 P. W. 70.

(c) 2 Atk. 101.

(d) According to the report in 1 P. W. 70. *Gould J.* differed with the rest of the Court.

v. Kemp. (a) In *Gilb. Tenures*, 258. it is laid down, that "as well estates as descents of copyholds, are to be guided according to the rules of common law, as a necessary consequence upon the customary estates." And accordingly we find many cases in which it has been held, that customary estates of freehold cannot be made to commence in futuro. In *Dunnal v. Giles* (b) it was held, that "If I surrender to the use of B. after my decease, it is not good." And in *Clamp's* case, as reported by *Leon.* (c), "A copyholder in possession surrendered the reversion of his land post mortem suam to the lord to an use, &c.; it was adjudged that thereby nothing passed." In *Seagood v. Hone* (d) the same principle was recognised. *John Reeve*, copyholder in fee, surrendered to the use of certain persons, with this stipulation, "this surrender not to stand and be in full force until after the death of J. R." J. R. died, and the surrender was presented at the next court, and the surrenderees admitted, and upon that clause it was resolved, "that the surrender was good, and that clause, being repugnant to the premises, shall be rejected as void and idle, and shall not destroy the premises;" whence it may be inferred that such a clause, if not void, would have rendered the surrender inoperative. *Simpson v. Sotherne* is a very important case. According to the report in *Cro. Jac.* it was there expressly decided, first, "that a copyholder in fee cannot surrender habendum after his death, no more than a tenant in fee can convey his lands habendum after his death, for then he should leave a particular estate in himself, which is against the rules of law, and there is not any difference betwixt a copyhold and a freehold to that purpose." Secondly, that a

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(a) 3 T. R. 470.

(b) 1 Brownl. 41.

(c) 4 Leon. 8.

(d) Cro. Car. 366.

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conditional surrender to operate in futuro is bad. And although the report in 2 *Bulst.* is somewhat different, yet it is not according to that account by any means an authority for the plaintiff. *Coke* C.J. is there made to say, the case may peradventure somewhat vary from *Clampe's* case, because in the latter the surrender was post mortem, in the former *habendum* post mortem; but *Houghton J.* says, "a surrender of a copyhold estate to the use of another is a conveyance, and a man cannot make a conveyance to begin upon a contingency; no case there is of this:" and *Croke J.* adds, "By devise such an estate might be made, but not so as here it is, in point of a surrender, which cannot be good." In *Barker v. Taylor* (a), *Clampe's* case is recognized; and the same point was ruled in *Bambridge v. Whitton*. (b) The case of *Allen v. Nash*, cited on the other side from *Noy's* reports, is very differently reported by *Brownlow* (c), it is there said that the surrender was to the second son for life, after the death of the tenant and his heirs, and it was adjudged *not* to be a good surrender; and in the *Lex Cus-tum.* 117. the case as reported by *Noy* is said to be a bad decision. *Roe v. Griffiths*, and the whole of that class of cases where the question was not discussed, but the whole passed sub silentio, cannot have any weight. But supposing a surrender to take effect in futuro could be valid, still it does not follow that a vested estate in a copyhold can be defeated by the execution of a power to revoke the uses of a surrender and declare others in lieu of them. In a note to *Gilb. on Uses*, 353. Mr. *Sugden* expresses his opinion that a vested estate cannot be so defeated,

(a) *Godb.* 451.

(b) *March.* 176. This report contains the argument of the plaintiff's counsel only, and concludes with a prayer of judgment; the result does not appear.

(c) *Part i.* 197.

and

and he relies upon *Co. Copy.* s. 36. p. 83., where it is laid down that "a copyhold interest cannot be transferred by any other assurance than by copy of court roll according to the custom." A passage was cited from *Co. Copy.* 81. to show that in customary grants upon surrenders the law is not so strict as in grants at the common law, and some instances of surrenders to the use of persons not in esse were put; but Lord *Coke* proceeds, "The reason of the law is this; a surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee before the lord hath admitted him according to the surrender; and, therefore, if at the time of the admittance the grantee be in *rerum natura*, and able to take, that will serve." There is not a word there to support the opinion that a vested estate of copyhold may be divested by the execution of a power. If then the Court should be of opinion that a surrender to uses to arise in futuro may be good, still the plaintiff cannot be entitled to judgment, unless it is further held that a power to revoke vested estates and limit new ones may be reserved in the deed originally declaring the uses of the surrender.

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Tinney in reply. It must be admitted that a copyholder has the legal estate, but the question turns upon the application of the incidents to such estates. It is said that a vested estate will in this case be destroyed, if the power is held good, but in the case of a surrender by a copyholder in fee to him who shall be heir of *J. S.*, until the heir is ascertained, the estate remains in the surrenderer, and that is afterwards divested. So in the case of a surrender to the use of an intended wife after the marriage, and in the mean time to the use of the surrenderer

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renderer and his heirs, which was the state of facts in *Bentley v. Delamor*. (a) In like manner here the estate may be devested, the power to do that being reserved by the same instrument by which the estate was originally granted. The case of *Simpson v. Sotherne* could not decide that shifting uses of copyholds were not good, for *Coke C. J.* there said it was unnecessary to give an opinion upon the point. The case at the utmost only decided that a surrender must be an immediate conveyance, and determined nothing as to the uses which might be declared upon it. As to the report of *Allen v. Nash* by *Brownlow*, where it is said that "a surrender to *A.*, after the death of *B.* and his heirs," was bad; that is very true, because it would tend to a perpetuity, but non constat, it would have been held bad if the words *and his heirs* had been omitted. Shifting and springing or executory limitations are allowed in wills, because they do not contravene any rules of law, as wills do not convey lands by transmutation of possession. The same reasoning applies to surrenders of copyholds, which may, therefore, in like manner be limited to such uses.

Cur. adv. vult.

The following certificate was afterwards sent:

This case has been argued before us by counsel. We have considered it, and are of opinion, that the plaintiff has an estate in fee simple at the will of the lord, according to the custom of the said manor, in the said copyhold messuages and hereditaments with the appurtenances.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD. (b)

(a) *Frem.* 267.

(b) *Littledale J.* not having heard the whole argument, did not sign the certificate.

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RULE OF COURT.

Trinity Term, 7 Geo. 4. 1826.

WHEREAS by statute 6 *Geo. 4. c. 50. s. 23.* a provision is made, that where a rule shall be drawn up for a view, the rule shall, if the Court or Judge granting the same think fit, require the person applying for the view to deposit in the hands of the under sheriff a sum of money, to be named in the rule, for payment of the expences of the view.

And whereas it is desirable that some general rule should be made upon this subject:

IT IS THEREFORE ORDERED, That upon every application for a view there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under sheriff, that the sum to be deposited shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles; and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles; and if such sum shall be more than sufficient to pay the expences of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expences, the deficiency shall forthwith be paid by such attorney to the under sheriff: And it is further ordered, That the under sheriff shall pay and shall account for the money so deposited, according to the scale following, that is to say,

For

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The KING *against* THOMAS WILLIAM COKE,
Esq. (a)

UPON an appeal by *T. W. Coke, Esq.*, against a rate for the relief of the poor of the parish of *Lydd*, the sessions confirmed the rate, subject to the opinion of this Court upon the following case :

By letters patent, dated the 28th *June*, 13 G. 2., that king granted to *Thomas Lord Lovell*, his executors, &c., all that the lighthouse at or near *Dungeness*, in the county of *Kent*, and free leave, licence, power, and authority to maintain, continue, and renew the same with lights, to be continually burning therein in the night season, from time to time ; and (if need were) to alter, remove, and change the same, and to rebuild another at any place near the same, by the advice or direction of the master, wardens, and assistants of the *Trinity House of Deptford Strond* for the time being ; and such lighthouse, so rebuilt, to maintain, continue, and renew with lights, to be continually burning therein in the night season, in such manner as might be for the safety and direction of the traders that way : and for defraying the necessary charges in maintaining, continuing, altering, renewing, removing, and changing or rebuilding the same, the king did thereby grant, that during the term of years thereafter granted, the said *Thomas Lord*

Where a poor-rate was imposed upon " a lighthouse, together with the duties and contribution money payable in respect of ships passing by the same," and the lighthouse was occupied by a servant of the owner, and was situated in the parish, but the duties were collected out of the parish : Held, that these duties did not constitute part of the annual profits of the house or land where the light was placed, and were not rateable to the poor.

(a) Two or more Judges of this court sat in banc, as on former occasions, from *Thursday* the 15th day of *June* to *Saturday* the 24th of *June* inclusive ; and again from *Monday* the 30th of *October* to *Saturday* the 4th of *November* inclusive ; during which periods this and the following cases were argued and determined.

Lovell,

be 4*l*. Mr. *Coke* does not reside or inhabit within the town, liberty, or parish of *Lydd*, nor occupy or possess any property within the town, liberty, or parish in any manner whatever, except as aforesaid. Personal property, stock in trade, or the profits of manufactories, never have been rated in the parish of *Lydd*, nor are assessed by the rate in question, up to the time of making which the lighthouse had been rated as a cottage only, at the sum of forty shillings, and the duties or contribution money had never been rated or taken into account in making the rate. The rate in question was made on the 2d day of *April* 1825, and Mr. *Coke* is rated therein as "the occupier of the lighthouse, with the duties or contribution money in respect of ships, hoys, and barks passing by the same," the annual value of the same being stated to be 2250*l*. The duties or contribution money yearly collected for Mr. *Coke* under the above-mentioned letters patent amount to the sum assessed in the rate, over and above the expence of keeping up the lighthouse and lights.

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Boteler, *Darby*, and *Burton* in support of the order of sessions. The defendant was liable to be rated to the full amount of the annual profits of the light-house. Those profits arise principally from the tolls; and although tolls are not rateable, per se, yet they are, when mixed with a rate upon other property, which, as having substance and locality within the parish, is properly rateable there, *Rex v. Sir A. Macdonald*. (a) Here the lighthouse has substance and locality within the parish, and is therefore rateable in respect of the

(a) 12 *East*, 324.

affect it where the profits arise from a chattel annexed or a privilege attached to it. Now, the case of *Rex v. The New River Company* (a) is an authority to show, that where the profits of the land are derived from actual produce, those profits are rateable although they arise or are received out of the district in respect of which the rate is made. There the water could not become valuable to the company until it was conveyed to *London* or *Westminster*; and the Court were of opinion, that the land was rateable in respect of its improved value in *Amwell*, although the profits were received out of the parish. Upon the authority of that case, therefore, the lighthouse must be rateable for all its profits, by reason of its being locally valuable in *Lydd* and earning the tolls there, although the profits be derived from ships which do not come within the parish. The light, as was said of the water in the case of the *New River*, may here be considered actual produce; and if so, it is immaterial whether its intrinsic property convey it to the ships, or whether it be conveyed by other means as the water was in the case of *Rex v. The New River Company*. In that case the produce could not be valuable in a different parish from that in which the rate was made, until it was detached from the local visible property; but in this case the light (for the opportunity of using which the ships are to pay), remains attached to the local property in the parish of *Lydd* at the very time when it becomes valuable, and, indeed, would be of no value were it not attached to it. [*Bayley J.* The building, if let at a

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(a) 1 M. & S. 503.

it continues in the house, in the same manner as a billiard table or any other chattel annexed to the freehold, so long as it remains, gives the freehold a greater annual value. [*Bayley J.* The light need not be attached to the freehold, it might be placed on the end of a pole.] The words of the patent are, "build and renew the same *with lights*," so that it clearly contemplated that the light should be attached to the freehold, but this does not affect the question. In the case of a soke mill, the abstract right to the multure forms part of the rateable value of the mill. In *Rex v. Bradford (a)*, the privilege of selling liquors was considered a profit appurtenant to a particular house arising from its local situation. The privilege, therefore, to keep the light in the house being profitable, the profits give a value to the house.

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Nolan and *Tindal* contra. Tolls are not rateable per se, and in order to make them rateable where the proprietor of the tolls resides out of the district for which the rate is made, they must be annexed to something real and substantial, locally situate within the district rated, or accrue there as profits in respect of the use of the land there occupied by the person assessed. First, the privilege of keeping the light or the tolls payable in respect of it are not appurtenant to any particular land or house in *Lydd*. The object of the grant may be attained without fixing the light in any building, as by placing it in a moveable frame. The privilege is not connected with or appurtenant to the house or land, although it be exercised there. Suppose that instead of

(a) 4 M. & S. 317.

from the present case, except the two cases *Rex v. Rebowe* (a) and *Rex v. Tynemouth* (b), where it was expressly decided that the tolls of a lighthouse were not rateable. A considerable interval of time elapsed between the decisions in those cases. And where there has been one uniform course of proceeding as to property of this description for a very considerable period of time, we ought not to introduce any alteration, unless it be founded upon sound legal principles. The privilege of erecting lighthouses was, I apprehend, originally in the Crown. I believe it was afterwards vested in the *Trinity House*. The tolls are contributed by the proprietors of ships, and if the sums of money which they from time to time pay be properly proportioned, they will contribute a sum sufficient to remunerate the proprietor for the expence of keeping up the lighthouse, and to leave a moderate and reasonable profit for the trouble of renewing the light. If the proprietor of the lighthouse be rateable to the poor, the contribution which he will expect from the proprietors of ships must be proportionally larger, and they, in reality, will pay the rate, which will therefore become a burthen upon commerce. In *Rex v. Sir A. Macdonald and Others* (c), the rate was upon the loch, and the defendants were rated as occupiers in respect of the use of the land which they had in the parish, for the loch dues were payable in respect of the use of the loch which itself formed part and parcel of the land. In *Rex v. The Oxford Canal Company* (d) the company were rated as the occupiers of the *towingpath-land*, and that part of the canal lying within the parish of *Sow*.

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(a) *Const.* 142. pl. 177. *Cowp.* 583.(b) 12 *East*, 46.(c) 12 *East*, 324.(d) 4 *B. & C.* 74.

the produce of the land of that parish ; for although it was sold, and the value realized at a different place, it still constituted part of the profit of the land in the parish, and was rateable there in the same manner as land producing vegetables is rateable in the place where they are grown, and not where they are sold, and that, although the proprietor of the land be under a contract never to sell in his own parish, but at a distant place. *Rex v. The New River Company* (a) does not bear upon the present case, because the proprietor of the lighthouse in this case is at liberty either in that house or in any other which he may think fit to erect or to rent, to burn lamps, and to produce a stream of light which shall be visible at a considerable distance at sea. But even if by the terms of the letters patent it were imperative on the grantee to burn his lights within this particular lighthouse, still if the privilege is not given to him by reason of his being the occupier of that house, it would not be appurtenant to, but distinct from, the house where it was to be exercised ; and the duties payable to him in respect of the light, would be profits arising from the exercise of that privilege, and not from the house or land where it happens to be exercised. The grantee would, in that case, have an exclusive privilege of carrying on in that particular house (if I may so express myself), a particular description of trade. But there would be no necessary connection between the freehold interest in that house, and the light which is to be kept up in it. The apparatus which is to contain or produce the light may, or may not, be attached to the freehold, and if it were

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would be personal property. The proprietor of the lighthouse does no more than keep a candle or a fire lighted, and for keeping his lights, whether produced by candle, or by burning coals, or by oil, and for keeping mirrors behind those lights, the tolls and duties which are the subject of the rate are imposed. Such tolls down to the present time never have been rated, and in my opinion they are not rateable.

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HOLROYD J. This is a rate made, not upon the lighthouse alone, but on the lighthouse together with the duties or contribution-money in respect of ships, hoys, and barks passing the same. I am of opinion that the lighthouse is rateable for the sum at which it may be valued, but that the tolls and duties are not rateable. We cannot hold them to be rateable unless we overturn the cases of *Rex v. Rebowe* (a) and *Rex v. Tynemouth* (b), and the principles upon which those cases have been decided, as well as others in which it has been held, that tolls, although not rateable per se, are rateable where they can be considered as money paid for the use and occupation of the land. The case of *Rex v. Rebowe* was very similar to the present. There, the King, by letters patent granted to Sir J. Rebowe liberty to erect lighthouses at *Harwich*, and towards the maintenance of them certain duties and tolls were made payable by all ships passing or coming into that harbour. That was a franchise granted by the crown, it differs from many others which are called so, but the privilege granted was a franchise. The power to erect lighthouses originally belonged to the Lord High Admiral, and afterwards

(a) *Const.* 142 pl. 177. *Cowp.* 583. *Nolan's P. L.* vol. i. p. 99.

(b) 12 *East*, 46.

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was granted to the *Trinity House*. What is the toll payable for? Not for any benefit received within the parish, for it is payable every time the ships pass the lighthouse, whether any benefit be received or not by the ships, whether they pass by day when the lights are out, or whether they pass in the night when the lights are burning. In *Rex v. Rebowe* the rate was made upon the tolls and duties, and Lord *Mansfield* says, "They have, properly speaking, rated the fire and the profits arising from the house; the *Pantheon* playhouse and other places of public amusement are rated, I suppose, but not for their profits." And after taking time to consider, Lord *Mansfield* and all the Judges were of opinion, that Mr. *Rebowe* ought not to be rated for the tolls: he says, "the *property* is not in the parish." By property he does not mean the lighthouse, but the tolls, which did not arise from any benefit received in the parish by the persons paying toll. He afterwards says, "The tolls are not locally situate in the parish, and are not rateable there." If they were to be considered as part of the money for which the lighthouse might be rated, they might have been rated under the denomination of tolls. At a considerable interval of time after the decision of that case, came the case of *Rex v. Tynemouth*.^(a) There Mr. *Fowke* was rated for tolls in respect of his lighthouse. Lord *Ellenborough*, after stating that the case was similar to that of *Rex v. Rebowe*, says, "What local property is there within the township on which this rate on the tolls can be levied? The tolls are not received *there*, nor do the ships from which they are

(a) 12 East, 46.

collected come within the township, the subject matter of the rate has no *locality* within the township." Lord *Ellenborough* is there speaking of the tolls, and not of the lighthouse as the subject matter of the rate, for the lighthouse was within the township. Now in this case the profits of the lighthouse arise from the tolls which are rated under the name of duties and contributions. I think, according to these two cases, we must decide that the tolls not being received, and having no locality within the parish of *Lydd*, are not rateable. In *Rex v. Cardington (a)* the tolls for passing a sluice were rated. There the party who paid the tolls used the thing for the use of which they were paid; and the benefit, for which the toll was paid, was within the parish; the Court held, that whether or not the profits of the sluice were rated as tolls, the nature of the property rated was to be considered, and the tolls being paid for a use of something which conferred a benefit within the district where the rate was made, they confirmed the rate. Here the benefit for which the tolls are paid, (which are an incorporeal hereditament,) is not one of the things mentioned in the statute of the 43d of *Eliz.* For it constitutes a benefit not received within the parish, but received by ships elsewhere, or not received at all if they pass in the day-time when no light is burning. Unless, therefore, we act contrary to the decision in *Rex v. Rebowe* and *Rex v. Tynemouth*, and to the principles acted upon in other cases where tolls have been recognized as rateable when paid or earned within the district for which the rate was made, we must decide that these tolls are not rateable.

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(a) *Cowp.* 581.

light at the top of a house for his own benefit, for it might, otherwise, be liable to many accidents from the fluctuation of the wind. In all the cases which have been cited as analogous to this, the profit arising from the thing which formed the subject of the rate not only was within the parish or township, but there was also within the parish an *actual* use of the thing which was the subject of the rate, and some person there had a certain occupation of the thing. In the case of a canal, the owner of the goods makes use of the canal which is rateable as land; the party paying the tolls has actually the use of the property itself which is the subject of the rate. So in the case of a bridge, the thing which produces the tolls is used. So as to the tolls of a market, the tolls arise by persons bringing their goods into the market, and the profit arises within the district. So in the case of a soke mill, a party takes his own corn to be ground at the place, and he has within the parish the use of the thing which is the subject of the rate. To make tolls rateable there must not only be a profit produced within the parish, but it must also arise from the use of the thing, and in respect of it. Here the ships have not that sort of use; they have merely a transient view of the light as they pass. They do not come within the lighthouse as they do within a dock; in that case they have the actual use and occupation of the dock. They not only do not come near the thing itself which is the subject of profit, but they do not come within the parish. This is distinguishable from all the other cases where the tolls themselves have arisen in respect not only of what was produced in the parish, but from the actual use of the thing which was the subject of the rate. That being so,

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I am of opinion that this rate in its full extent cannot be supported. It must, therefore, be amended.

Rate to be amended by striking out the sum of 2250*l.*, at which the defendant was assessed, and inserting 4*l.* (a)

(a) The following case, upon the subject of rating lighthouses, was decided in *Michaelmas* term, 7 G. 4.

The KING v. W. FOWKE.

Upon an appeal against a rate for the relief of the poor of the township of *Tynemouth*, in the county of *Northumberland*, the court of quarter sessions confirmed the rate, subject to the opinion of this Court on the following case :

The defendant is the proprietor and occupier of a certain lighthouse, called "*Tynemouth Castle Lighthouse*," in the township of *Tynemouth*, and is entitled to certain tolls, payable in respect thereof and the light therefrom, under certain letters patent of the 17 *Cer.* 2., viz. the sum of 1*s.* for every ship belonging to any of the king's subjects passing by the lighthouse, and belonging to or trading to the ports of *Newcastle* and *Sunderland*, or either of them, or the creeks or members of the same; and 3*s.* for every ship belonging to any foreigner or stranger coming or passing by the said lighthouse; and the defendant is also entitled to additional light duties under the statute 42 G. 3. c. 43. The letters patent in the 17th year of *Charles* the Second were set out in the preamble of that statute, and recited, that the king had been given to understand, that there had been a long and constant toll of 4*d.* per ship for the maintenance of a lighthouse at *Tynemouth*, which being decayed and fallen down, another had been built by *Edward Villiers*, Esq., to the great benefit and advantage of his majesty's subjects and others trading to those ports; and that the king had been informed that a contract had been made on behalf of *Villiers* with divers masters of ships and others trading that way, and that they had voluntarily submitted to increase the toll of 4*d.* per ship to 1*s.*, and to continue the payment thereof for the perfecting of the work, which had cost 1000*l.*; his majesty approving the contract, and for the encouragement of this necessary work, granted to *Villiers*, his heirs and assigns, the custody of the lighthouse so erected as aforesaid, and the ground and soil whereupon the same was situate, together with liberty, licence, power, and authority, that he and they should and might continue, renew, and maintain the lighthouse, with lights to be continually burning in the night season, whereby ships might the better come to their harbours and ports without peril. The letters patent then proceeded to recite, that so much as a work of so public a nature and benefit ought to be maintained and supported, his majesty, for defraying the necessary charges and continual maintenance of the lighthouse, granted that for ever thereafter there should and

and might be collected for every ship passing by the lighthouse the tolls therein mentioned. The preamble of the act then recited, that the widow of the grandson of the patentee having become seised in fee of the lighthouse and premises, devised all that her freehold estate at *Tynemouth Castle*, called "*Tynemouth Great Lights*," in the county of *Northumberland*, with all privileges thereto belonging, to trustees, until *W. Fowke*, therein described, should attain the age of twenty-one years; that the master, wardens, and assistants of the corporation of the *Trinity House of Newcastle-upon-Tyne*, taking into consideration the then present state of *Tynemouth lighthouse and light*, and the great benefit which would result to the ports of *Newcastle and Sunderland*, if the lighthouse should be altered by taking down a part, and erecting a copper lighthouse lantern, and reciting that such alteration and improvement in the light might be of great public utility, &c., it was enacted, that from and after the altering and improving of the said lighthouse, and exhibiting therein an oil light, there should be paid to the person who, for the time being, should be seised of, or entitled in possession, to the said lighthouse, for every ship which should come or pass by the said lighthouse and light, or receive the benefit thereof, the additional tolls therein mentioned. There was a proviso in the act, that nothing should extend to charge or make liable any person with the payment of the said tolls or duties thereby granted, except whilst the said lighthouse should be duly supported according to the alteration and improvement aforesaid, and should have such light as aforesaid duly exhibited therein accordingly. By another clause, the proprietor of the lighthouse was enabled to charge the lighthouse and premises with any sum not exceeding 2500*l*.

The alterations in the lighthouse have been made in conformity to the act of the 42 G. 3. c. 43. The lighthouse is in the township of *Tynemouth*, and the tolls or duties arising to the defendant are payable in respect of vessels passing the lighthouse and receiving the benefit thereof. Of the entire number of vessels thus paying tolls, not a thirty-eighth part come within the township of *Tynemouth*, but pass the lighthouse, and so incur the toll when sailing upon their course in the *German Ocean*, or when entering from the main sea into parts of the river *Tyne* and port of *Newcastle*, belonging to other townships. The remainder of the vessels paying toll do come within the township of *Tynemouth*, and receive their loading there. The tolls received in respect of such last mentioned vessels do not equal in amount the expence of maintaining the light and managing the lighthouse; the whole of which expences are incurred within the township of *Tynemouth*. The tolls or duties paid in respect of ships arriving at or sailing from the said port of *Newcastle-upon-Tyne*, including the tolls or duties paid by the ships receiving their loading in the township of *Tynemouth*, are collected at the Custom-house in the parish of *All Saints*, in the town and county of *Newcastle-upon-Tyne*, by a person appointed by the defendant for that purpose; and the tolls or duties paid in respect of ships sailing from the coasting ports, are collected at the ports from whence they sail, if they clear at the Custom-

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of *Somerset*. The affidavit on which the rule was obtained stated, that the accounts were produced at a vestry meeting on the 24th of *September* 1824, and by a resolution of the vestry, the surveyor was directed to submit them to the Rev. S. F. *Wylde*, the nearest magistrate, to which he assented; but instead of so doing, he carried his accounts to the special sessions on the 4th of *October*, when they were allowed by the justices. In *Trinity* term, 1825,

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Adam showed cause against the rule, and contended that a certiorari would not lie in this case, and cited *Rex v. Justices of St. Alban's*. (a)

Campbell, contra, relied upon *Rex v. The Justices of the West Riding of Yorkshire* (b) and *Rex v. Mitchell* (c), and also upon a case decided in *Michaelmas* term, 19 G. 3., in which it was held, that where the thing done was not in pursuance of the act, the certiorari was not taken away; and he contended, that the allowance of the accounts in this case was not in pursuance of the act.

ABBOTT C. J. I think we ought to make this rule absolute; and any objection to the issuing of the certiorari may be further discussed when the return is made.

A rule nisi for quashing the order was afterwards granted, against which

(a) 3 B. & C. 698.

(b) 5 T. R. 629.

(c) 5 T. R. 701.

(It is probably the same case cited in the argument in *Rex v. The Justices of the West Riding of Yorkshire*.)

Middlesex. Motion for a certiorari to remove an order of sessions for pulling down a turnpike gate erected by authority of the commissioners at the bottom of *Gray's Inn Lane*. An inhabitant of an adjoining street, in behalf of many other inhabitants, preferred a petition and complaint under the last general highway act, giving a power to justices in sessions to remedy the mischiefs occasioned by the commissioners exceeding or abusing their authority, and the sessions (adjudging that the commissioners had exceeded their power) directed the sheriff to abate the nuisance.

Serjt. *Davy*, on behalf of the commissioners, says, that the act of parliament they act under does not appoint where the gates shall be erected, therefore they had power to place one there; and if so, the justices had no jurisdiction, that only accruing when the commissioners exceeded theirs. Rule nisi granted. (The general highway act prohibits a certiorari, but that applies only to appeals, and though no other proceedings are removable, it can only mean such proceedings as are had by competent jurisdiction.)

Cause shown against rule nisi for a certiorari. That the justices at sessions, acting under a clause in the last general highway act, 13 G. 3. c. 78. (which gives them a power in all cases, where commissioners have caused gates to be erected in places where they have no right to erect them, to cause such gates to be removed), adjudged that the commissioners could not cause a new gate to be erected on the turnpike road, solely for the benefit of the lessee, without the public receiving any advantage to compensate for this additional burthen, and therefore directed the gate to be removed; but

Per Curiam. The justices have only this power when gates are erected in places where the commissioners have no right to erect them, and not when they have been erected for improper purposes. Therefore the rule must be absolute for a certiorari.

Order of sessions returned.

In *Hilary* term, a rule nisi was granted to quash the order of sessions, which was afterwards done without opposition.

See also *Rex v. The Justices of Derbyshire*, 2 *Ld. Kenyon's Rep.* 299.

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another company was incorporated under the name of "*The Company of Proprietors of the Birmingham and Fazely Canal Navigation*," which was empowered to make, complete, and maintain a canal commonly called the *Lower Level* as an extension of one of the said collateral cuts so made under the 8 G. 3., and certain other canals and cuts. By sect. 12. of this act it is enacted as follows : " And whereas the making of such canals and collateral cuts will be of real advantage to the owners and proprietors of certain coal-mines, and other mines and minerals already opened, and which may be opened contiguous or near to the said canals and collateral cuts, and it will be necessary for supplying the said canals and collateral cuts with water, that the water to be raised by the fire-engines or other machines erected or to be erected for draining the said mines, should be discharged into the said canal or collateral cuts ; be it, therefore, enacted, that it shall be lawful for the said company of proprietors, and they are hereby authorized and empowered at all times hereafter to have, divert, and take the water to be raised or drained by means of any fire-engine, machine, or level already or hereafter to be erected, made, or opened in or upon any lands or mines within the distance of 1000 yards of the said canals or collateral cuts, except as hereinafter is excepted, without any recompence or satisfaction to be made by the said company of proprietors for the said water so to be diverted and taken as aforesaid." The same act contains in s. 27. the following exception : " Provided always, and be it further enacted and declared, that nothing in this act contained shall extend to authorize or empower the said company of proprietors to take or make use of any of the water which shall be raised from any mines of coal, ironstone,

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or other minerals, unless the coal, ironstone, and other minerals produced by such mines shall be carried or conveyed along some part of the said intended canals or cuts." Under the powers of this statute the canals and cuts thereby authorized to be made were completed. By the 24 G. 3. c. 4. reciting the 8 G. 3. c. 38. and 23 G. 3. c. 92., the canals made by virtue of those acts were united, and made one common concern, but it was provided that the 8 G. 3. c. 38. should not apply to the canals made under the 23 G. 3. c. 92., and that the latter statute should not apply to the canals made under the former. By the 34 G. 3. c. 87. the company was named, "*The Company of Proprietors of the Birmingham Canal Navigations*," and by that and some subsequent statutes various alterations and improvements of the canals were authorized. By the 58 G. 3. c. 19. reciting the above statutes, and that it was highly expedient to extend one system of management to the whole of the canals and cuts therein referred to in such way as to render the same more simple, and to alter such parts of the former system as were by experience found improper, or had been by circumstances rendered unavailing, it was enacted, "That all and every the canals, collateral cuts, and navigable communications so made as aforesaid by the said company of proprietors of the *Birmingham* canal navigations, under and by virtue of all or any of the said hereinbefore recited acts or any of them, shall from the time of the making thereof respectively be, and be deemed, taken and considered to be, part, parcel, and member of the *Birmingham* canal navigations, and all and every such part and parts of the said canals, collateral cuts, and navigable communications, and the lands, buildings, tenements, and hereditaments

ments already purchased or taken for the purposes thereof, by virtue and in pursuance of the powers of the said recited acts or any of them, and as have not been already declared by any of the said recited acts to be considered as part of the works made and done under and by virtue of the said recited act of the 23d year of his present majesty's reign, shall be, and be considered to be, included and comprehended in and governed by all and every the clauses, matters, and things contained in the said recited acts of the 23d and 24th years of his said present majesty's reign, so far as the nature and circumstances of the case will admit, (save and except so much thereof as relates to exemptions from stamp duties, or to the quantum of rates or tolls to be collected, or as may be by this act, or have been by any other act relating to the said *Birmingham* canal navigations altered or repealed,) as if the same had been described in the said recited act of the 23 G. 3. as part of the works to be made and done under and by virtue of that act."

In the year 1819, the plaintiff, and *Thomas Price*, deceased, became lessees of the mines under thirty-six acres of land, with liberty to use at a stipulated rent such portion of the surface as they might require for getting and working the said mines; and the term of years granted in such mines is yet unexpired. In the year 1821, the plaintiff and his then partner began to work the mines, and the water raised by the whimsey was conveyed by a feeder made by defendants under directions of *Price*, to the canal of the 23 G. 3., called the *Lower Level*. In 1821, the plaintiff, by the withdrawing of *Price*, became sole owner of the mines during the remainder of the lease, and as the water in the mines continued to in-

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mentioned canal, a portion amounting to nearly one third of the produce of the mines, consisting of coals and ironstone, is afterwards, in the course of each respective voyage, carried and conveyed from the canal made under the 8 G. 3. into and along the *Lower Level*, the canal made under the 23 G. 3.

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Campbell for the plaintiff. The question depends upon the 12th and 27th sections of the 23 G. 3. c. 92. The defendants, by the 12th section, are entitled to take the water raised from the plaintiff's mines, unless he is protected by the proviso in the 27th section. Now that confines the privilege of the company to those mines, the produce whereof is "carried or conveyed along some part of the intended canals or cuts." To be within that enactment, it is necessary, first, that the coals, &c. should be carried *immediately* from the mine along the canal; it never could be intended that the owner of the mine should be rendered subject to the privilege claimed by the company, if any part of the produce were at some distant point, and perhaps without his knowledge or concurrence, carried along a part of the canal. Secondly, the meaning of the enactment is, that *substantially the whole* produce of the mine should be carried along the canal. In the present case, no part of the produce was carried from the mine immediately along the canal, and only one third was carried along any part of the canal. It will, perhaps, be said, that since the 58 G. 3. c. 19. was passed, the different levels are to be considered as parts of the same canal, and that the whole produce of the mine being carried immediately along the *Upper Level*, gives the company the privilege for which they contend. But in *Rex v. The Birmingham Canal*

that the clauses of the 24 G. 3. c. 4. shall extend to all the canals, as well as those of the 23 G. 3. c. 92.] Secondly, the produce of the plaintiff's mine has been carried along the *Lower Level*. It is said that the 27th section gives the privilege only where *the whole* produce is carried along the canal. If that were so, the act would as to this privilege be wholly ineffectual, for there can hardly be any instance in which some part of the produce of a mine is not consumed on the premises, or carried away by land. Next it was said that the produce must be carried immediately from the mine along the canal, but the owner derives benefit from the use of the canal, if the coals be carried along it in the course of the voyage on which they are sent from the mine. He should, therefore, in such a case be subjected to the privilege claimed by the defendants.

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BAYLEY J. There are two questions in this case. One arising upon the 23 G. 3. c. 92., before the passing of the 58 G. 3. c. 19., the other upon the latter statute. The canal called the *Upper Level* was made under the 8 G. 3. c. 38., which gave no such power as that which the defendants now seek to exercise; but the 23 G. 3. c. 92. contains two clauses upon which the point depends. By the 12th section a general power is given to take the water raised from all mines within 1000 yards of the canals made under that act, and but for the proviso in the 27th section the company would have been entitled to all such water, notwithstanding any previous appropriation of it, unless that had been made by an act of parliament. The 27th section, however, provides that the company shall not be entitled to take or make use of the water raised from any mines of coal, &c., unless the
coal,

under the 8 G. 3. c. 38., it would by matter *ex post facto* cast a considerable burden upon the proprietors of mines. No such intention being expressed in the recitals of the act, we ought not to presume it to have existed in the legislature. I, therefore, think that the words of the act are not sufficient to confer the privilege, and that in *Rex v. The Birmingham Canal Company* it was properly held that the canals were incorporated for the purposes of management only. For these reasons I am of opinion that the plaintiff is entitled to recover.

1826.

FINCH
against
The BIRMINGHAM Canal
Navigation Co.

HOLROYD and LITTLEDALE Js. concurred.

Postea to the plaintiff.

EVANS *against* ROBERTS.

INDEBITATUS assumpsit, for crops of potatoes bargained and sold. Plea, the general issue. At the trial before *Garrow B.*, at the Spring assizes for the county of *Monmouth*, 1826, it appeared, that on the 25th *September* a verbal agreement was made between the plaintiff and defendant, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of 5*l.*, and the defendant paid 1*s.* earnest. It was objected, that this was a contract or sale of an interest in or concerning land, within the meaning of the fourth section of the statute of frauds. The learned Judge was of opinion, that as the seller was to turn up the potatoes, the contract did not give the buyer any interest in the land; and he directed a verdict to be found for the plaintiff,

A verbal agreement made on the 25th of *September* for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them within the fourth section of the statute of frauds, but a sale of goods, wares, and merchandise within the seventeenth section.

but

the purchaser had such an exclusive possession as would entitle him to maintain trespass.

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Ludlow contra. The authorities show, that a sale of any growing product of the earth, which is not to be severed immediately, gives to the vendee an interest in or concerning the land, within the meaning of the fourth section of the statute of frauds; *Crosby v. Wadsworth* (a), *Parker v. Staniland*. (b) The very right to have the subject matter of the sale continue in the land constitutes an interest. *Waddington v. Bristow* (c) and *Emmerson v. Heelis* (d) are authorities in point. In the latter case, a sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being found, was held to be a sale of an interest in land.

BAYLEY J. I am of opinion, that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale and delivery of things which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; the vendor was to raise the potatoes from the ground at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course

(a) 6 East, 602.

(b) 11 East, 362.

(c) 2 Bos. & Pul. 452.

(d) 2 Taunt. 38.

that case, as well as in *Warwick v. Bruce* (a) the potatoes had ceased to grow; and, therefore, they are distinguishable from the present; but the reasoning of Lord *Ellenborough* in the latter case may assist us in coming to a right conclusion in the present; he there says, "If this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the *growing surface*, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby v. Wadsworth*. (b) But here is a contract for the sale of potatoes at so much per acre: the potatoes are the subject matter of sale; and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel." It does not appear that the other Judges gave any opinion upon that point; but it is clear that Lord *Ellenborough's* judgment proceeded upon the ground that if the contract gave to the vendee no right to the land so as to enable him to make a profit of the *growing surface*, then it was not to be considered as giving him an interest in the land, but merely in a chattel. The opinion delivered by *Mansfield C. J.* in *Emmerson v. Heelis* (c) is certainly at variance with our judgment in the present case. But it is first to be observed, that it was not necessary in that case for the Court to decide the question upon the fourth section of the statute of frauds; for the contract was signed by the auctioneer as the agent of the buyer, and was equally binding whether it was for a sale of goods and chattels or of an interest in land. The plaintiff there put up to sale on the 25th of September, by public auction, a crop of turnips then grow-

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 against
 ROBERTS.

(a) 2 M. & S. 205.

(b) 6 East, 602.

(c) 2 Trunt. 38.

merchandise; but their opinions were founded upon different reasons. Lord *Alvanley* thought that it was an agreement for the sale of goods, wares, and merchandise, and something more, viz. for the produce of the land in a certain state at the time of delivery. The opinions of *Heath* and *Rooke* Js. proceeded on the ground that the hops at the time of the contract did not exist as goods, wares, and merchandise. *Chambre* J. was the only Judge who intimated an opinion that the contract gave the vendee an interest in the land. He certainly stated that the contract gave the vendee an interest in the produce of the whole of that part of the vendor's farm which consisted of hop grounds. I concur in opinion with the three learned Judges, who thought in that case that the hops were not goods, wares, and merchandise at the time of the contract; but I do not agree with Lord Chief Justice *Mansfield* that there was no distinction between the hops in that case and the growing turnips in the case of *Emmerson v. Heelis*, because I think that in the latter case the growing turnips at the time of the contract were chattels. It has been insisted, that the right to have the potatoes remain in the ground is an interest in the land: but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In *Tidd's Practice*, 1039., it is laid down that under a fieri facias the sheriff may sell fructus industriales, as corn growing, which goes to the executor, or fixtures which may be removed by the tenant; but not furnaces or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor and those which go to the

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a count for goods bargained and sold. Upon these grounds, I am of opinion that there was not in this case any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them within the fourth section of the statute of frauds; but that there was a contract for the sale of goods, wares, and merchandise within the meaning of the seventeenth section, though not to the amount which makes a written note or memorandum of the bargain necessary. The rule for entering a nonsuit must therefore be discharged.

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 against
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HOLROYD J. I also think that this rule ought to be discharged. This is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute. He clearly had no interest so as to entitle him to the possession of the land for a period, however limited; for he was not to raise the potatoes. Besides, this is not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract an interest in any specific portion of the land. The contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away. In *Parker v. Staniland* (a), Lord *Ellenborough* says, "The lessee *primæ vesturæ* may maintain trespass *quare clausum fregit*, or ejectionment for injuries to his possessory right; but this defendant could not have maintained either; for he had no right

(a) 11 *East*, 366.

Wadsworth (a), says, "The contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce, no longer did so: it was originally *an agreement to render what should have become a chattel*, i. e. part of a severed crop in that shape, in lieu of rent, and by a subsequent agreement it was changed to money instead of remaining a specific render of produce." So in this case the contract being for the sale of the produce of a given quantity of land, was a contract to render what afterwards would become a chattel; and although some advantage might accrue to the vendee by the potatoes remaining in the land, I think that was not an interest in or concerning land within the meaning of the 4th section of the statute of frauds.

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 against
 ROBERTS.

LITLEDALE J. I am of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them within the meaning of the 4th section of the statute of frauds. The words lands, tenements, and hereditaments in that section appear to me to have been used by the legislature to denote a fee simple, and the words any interest in or concerning them were used to denote a chattel interest, or some interest less than the fee simple. In the 5th section, which requires a will of lands, tenements, and hereditaments to be attested by three witnesses, the words "lands and tenements" are clearly used to denote a fee simple, and do not extend to leaseholds. The legislature contemplated an interest in land which might be made

(a) 6 East, 602.

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the subject of sale. I think, therefore, they must have contemplated a sale of an interest which would entitle the vendee either to the reversion or the present possession of the land. Now this contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty. In *Co. Lit. 55b.* it is laid down, "If tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God." Upon the death of the tenant for life the land belongs to the reversioner, but the growing crop goes to the executor of the tenant for life, as part of his personal estate. Lord *Coke* then states, "If a man be seised of land in right of his wife, and soweth the ground and he dieth, his executors shall have the corn, and if his wife die before him, he shall have the corn." Upon the death of the husband or wife, the interest of the former in the land ceases, yet the growing corn is considered as part of his personal estate, and belongs to him or his executors. Lord *Coke* afterwards puts other cases, and in all of them he distinguishes between the land and the growing produce of the land; he considers the latter as a personal chattel independent on, and distinct from, the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think that a sale of any growing produce of the earth (reared by labour and expence) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land within the meaning of the fourth section of the statute of frauds; but a contract for the sale of goods, wares, and merchandise within the seventeenth section of that statute. Such an interest goes to the executor and not

to

to the heir, and any thing which goes to the executor and not to the heir, may be taken in execution under a fi. fa. This is the rule of law as to tenants' fixtures, which bear a very close resemblance to those growing crops which are not the spontaneous produce of the earth, but are raised by the labour and expence of the occupier of the land. It has been held, that vats, coppers, &c. set up in a house by a lessee for years in relation to his trade, may be taken in execution under a writ of fieri facias issued against him, *Poole's case* (a); but that fixtures of a similar description cannot be taken in execution under a fieri facias issued against a party who was seised in fee of the house in which they were situate, upon the ground that they would go to his heir and not to his executor, *Winn v. Ingilby*. (b) Now, a growing crop of corn or potatoes, or of any vegetable which is produced not spontaneously by the earth, but by the labour and expence of the occupier, goes to the executor and not to the heir of tenant in fee simple. It would seem, therefore, that such a growing crop may be seised under a fieri facias, issued against the owner of the inheritance as his goods and chattels, even while they are annexed to the freehold. I cannot, therefore, consider the annual produce of land which is proceeding to a state of maturity, and which, when taken at maturity, will be severed from the ground and become *movable* goods and chattels, as an interest in or concerning land within the meaning of the fourth section of the statute of frauds, which seems to me to mean land taken as mere land, and not its annual growing productions; consequently the rule for entering a nonsuit must be discharged.

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 against
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Rule discharged.

(a) 1 *Salk*, 568.(b) 5 *B. & A.* 625.

during the term, commit or suffer to be committed, on any part of the premises, any waste or damage to the value of 10s., or should cut down or fell any maiden or sound pollard tree, or top, poll, or injure any maiden tree then or *thereafter* growing or standing on the said premises, without the licence of the Earl, his heirs or assigns, first had or obtained, the lease should be void. The interest of Earl *Poulett* in the demised premises having vested in the plaintiff, the defendant, who was tenant of the demised premises to the devisee of *Perkins* in 1824, and while two of the three cestui que vies mentioned in the lease were in being, cut down three apple trees which had been planted by the tenant after the granting of the lease. It was contended that apple trees were not excepted out of the demise, and, consequently, that the reversioner could not maintain trespass; and *Wyndham v. Way* (a) was cited. The learned Judge reserved the point, and a verdict having been found for the plaintiff, a rule nisi for entering a nonsuit was obtained in last *Easter* term.

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against
DENNING.

Tindal and *R. Bayly* now shewed cause. The words of the exception, "all timber trees and other trees," are sufficiently large to comprehend apple trees. *Wyndham v. Way* is not in point, because there it was to be collected from the language used, "all trees, wood, coppice wood, &c.," that the word "trees" was meant to apply to trees useful for their wood only. But in this case the lessor has demised the fruit only and not the bodies, and *Grantham v. Hawley* (b) is an authority to shew that such a grant is valid. But assuming that,

(a) 4 Taunt. 316.

(b) Hol. 132.

if

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if the exception had stopped at the words "all timber trees and other trees," fruit trees would not have been excepted, the other words, "not the annual fruit thereof," which refer to the annual produce of fruit trees, shew beyond all doubt that the bodies of those trees were intended to be excepted. It may be said, that in legal phraseology the term *fruit* is sometimes applied to the produce of timber trees as well as to the produce of those trees, which, in popular language, are termed fruit trees, and that by the terms, "not the annual fruit thereof," the parties may have intended to save out of the exception the acorns of the oak or the masts of the elm, and not the mere produce of the apple trees; but the word *fruit* must be construed in that sense in which it is supposed to have been used by the parties at the time of making the contract; and considering that the demised premises are in a county where apples constitute a valuable portion of the produce of the land, and that it was important to the tenant that he should have them, but of no importance to him to have the produce of other trees, there can be no doubt that the parties used the term *fruit* to denote the produce of those trees, which, in popular language, are denominated fruit trees.

Erskine, Coleridge, and Bere, contra. It will be most favourable both for the landlord and tenant to hold, that apple trees are not within the exception; for then the landlord may maintain an action of waste against the tenant, for an injury done to the trees, and may compel the tenant to keep the orchards properly and well stocked. In lieu of these advantages, all that the lessor can have (if the other construction prevail) is, that he may prevent the cutting

cutting down of the trees (which the tenant is not likely to be guilty of, so long as they are in bearing) and perhaps have the branches and bodies of the trees when blown down, which are of very little value. Then as to the tenant, if they are not within the exception, he acquires in those trees that general property which a termor has in all such as die, not being timber. He acquires, also, the right to use and prune the trees, and generally to manage the orchards in the best way for his own and his landlord's interest, which, under the other construction, it may be doubtful whether he has. But, secondly, if the apple trees be within the exception, then the trees are the landlord's. He may cut them down, but he cannot enter to plant new trees, nor compel the tenant to keep the orchard stocked, and the tenant is left at the mercy of his landlord as to the orchards. The grant of the fruit will protect him no more than in the case of acorns, walnut, beech, &c.; for it must extend to them also; and yet it can never be contended that such a grant prevents the landlord from cutting down what he pleases. It is a grant of the fruit only of such trees as he chuses to spare, and for so long as he spares them. In *Tregmiell and Ux. v. Reeve* (a) an exception of the timber trees, "saving that his said wife should have and take the shrowds and loppings of them," was held to protect all the trees from being cut down by the owner of the fee, but in this case no part of the trees was saved out of the exception. The words of the exception, without the saving which follows, would not include apple trees, for they do not pass under the general name of trees, *Wyndham v. Way* (b), *Waller v. Travers* (c), *London v.*

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(a) *Cro. Car.* 437.(b) 4 *Taunt.* 516.(c) *Hardres*, 309.

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The Chapter of the Collegiate
Lord Zouch v. Moore. (b) The
of the saving out of the excep
at large which the exception
cluded; it cannot extend the
in *Leigh v. Shaw* (c), where the
tory, except the mansion-house
chamber was held to pass by th
out of a saving makes it as
cepted. Besides, the exceptio
strued favourably for the les
Armitage. (d) If, therefore, t
not have extended to the a
saving which is to restrain th
in favour of the lessee cannot
because that would be to prej
and sufficient meaning may be
saving, "not the annual fruit
it to refer to the produce of
common term in the law for th
ber and other trees, as disti
properly called fruit trees. In
"it cannot be denied that th
viz. timber, is reserved by le
cannot grant it without the
termor has an interest in it,
fruit growing upon it, and
fuel." The word *fruit* is use
Dyer, 90 a. and 332 a.; and t
in *Liford's* case (e), where i

(a) *Hob.* 303.

(b) 2 Ro

(c) *Cro. Eliz.* 372.

(d) 2 B.

(e) 11 Co. 48.

lessee shall have the young of all birds that breed in the trees, and all fruits. The word is also used in the same sense, in *Co. Litt.* 53 a., *Berry v. Heard* (a) and *Com. Dig.* tit. *Biens, H. Trees*.

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against
DENNING.

BAYLEY J. I incline to think that apple trees are not within the exception. It is a general rule of construction that where there is any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception being the words of the lessor, are to be construed favourably for the lessee, and against the lessor, *The Earl of Cardigan v. Armitage*. (b) The question in this case is, whether looking to the subject matter of the demise, and the several clauses of the lease, fruit trees were clearly intended to be excepted, or whether there be any reasonable degree of doubt whether that were intended or not. Now a grant of "timber trees and other trees" will not pass fruit trees. Here the exception is, "of all timber trees, and other trees, but not the annual fruit thereof." Some meaning must, undoubtedly, be given to the latter words, for if the fruit saved was the fruit of orchard trees, it would follow that the bodies of those trees would be within the exception. But the term *fruit* in legal acceptance is not confined to the produce of those trees which in popular language are called fruit trees, but applies also to the produce of oak, elm, and walnut trees. In the old books the lessee is stated to have an interest in the trees in respect of the shade for cattle, and the fruit thereof. Therefore the words "the annual fruit thereof" may be satisfied by applying them to the produce of timber trees, and that being so, it does not ap-

(a) *Cro. Car.* 242.

(b) 2 B. & C. 197.

which the tenant covenants, in the place of every timber or other tree thrown down and decayed during the term, to plant or set another fresh grown young tree of the same kind in its stead. As there is no other express stipulation by the tenant, to plant any tree, it occurred to me that it must have been intended to include apple trees, but upon further consideration I think that such a consequence does not necessarily follow. The landlord, probably, may have thought it unnecessary to have an express covenant for that purpose, because it would be so much to the interest of the tenant to plant apple trees. Then, as it does not appear that the word *tree* in the other parts of the lease was intended to include apple trees, and as the tenant's continuing to have right to the fruit trees does not in any degree militate against the interest of the landlord, for the tenant is not at liberty to destroy the trees in the orchard, it seems to me there is nothing in the other clauses of the lease to show clearly that the parties intended to include apple trees in the exception. And as the words of the exception will not of necessity include them, I think the words of the saving part do not make it clear that the parties so intended, but leave the matter in doubt, and then the words of the exception must be construed in favour of the lessee, and against the lessor, and so construing them I think we are bound to hold that apple trees are not within the exception. The rule for entering a nonsuit must, therefore, be made absolute.

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against
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HOLROYD J. The question in this case arises upon a regular lease by indenture, containing all the formal parts belonging to such an instrument. It is therefore to be construed according to the rules of law laid down for the construction of such instruments, and in the

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sense which, by prior decisions, has been imposed upon the words there used. If any other meaning had been intended, that should have been expressed in clear unambiguous language. Here is a demise of certain premises with an exception of timber trees and other trees, but not the fruit thereof. Now it is a rule of construction, that where there is a grant and an exception out of it, the words of the exception are to be considered as the words of the grantor, and to be construed in favour of the grantee. (a) And there are several authorities to show, that the words *other trees* do not extend to fruit trees. If fruit trees are not included in the first part of the exception, and if the words of the exception are to be considered the words of the lessor, and to be construed in favour of the lessee, the question is, what is the effect of the saving words, "not the annual fruit thereof?" They were intended to operate in favour of the lessee. But it is argued, that they shall operate against him by extending the exception. We cannot infer that to have been the intention of the parties, if those words can have any other legal effect consistent with the sense imposed by prior decisions on the words "timber trees and other trees." Now the word "fruit," in our old law books, is frequently used to denote the produce, not only of orchard but of timber trees; and if that word be so construed here, the saving will not have the effect of operating against the lessee, by enlarging the exception. I think that it ought to be construed in that sense, and so construing it, apple trees are not within the exception. I think that this construction is consistent with the other parts of the lease which have been commented on by my Brother Bayley. If the parties had intended to

(a) 5 Co. 10 b.

except apple trees, they should have used words which, consistently with former decisions, would leave no doubt of that intention.

1826.

Barlow
against
Dunning.

LITTTLEDALE J. I am of the same opinion. The word *trees*, generally speaking, means wood applicable to buildings, and does not include orchard trees. The words, "not the annual fruit thereof," may apply either to the produce of orchard or to that of timber trees. Those words may, therefore, be satisfied without holding them to apply to the produce of orchard trees. And as it is doubtful whether it was intended to except fruit trees, the words of the exception must be construed favourably for the lessee. I think we are therefore bound to hold that fruit trees do not come within it, and that this rule must be made absolute.

Rule absolute.

The KING *against* The Chapel Wardens and Overseers of the Township of BILSTON.

UPON an appeal against a rate whereby a mine-engine and engine-pit were rated to the relief of the poor of the township of *Bilston*, in the county of *Stafford*, the sessions amended the rate by striking out the item objected to, subject to the opinion of this Court upon the following case :

The engine and pit were erected, sunk, and used by the appellants, solely for the purpose of drawing water from ironstone mines in their occupation. Nothing was raised from those mines except ironstone.

Where the owner and occupier of an ironstone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose: Held, that he was not rateable to the poor in respect of the engine.

pose the engine belonged to the owner of the surface, and he let it to the owner of the mine, upon what principle could it be said that it was not rateable? and there does not appear to be any real difference whether the owner of the mine erects the engine, or hires it of another person. If the owners of these mines were to lay a rail-road over the surface of the adjoining land for the purpose of carrying away the ore, that would be rateable, *Rex v. Bell (a)*, and yet it would be of no value, but on the contrary, a burthen, if it were not connected with the mine; and the same may be said of the weighing machine and carding machine. Where a coal-mine was worked merely for the purpose of raising coal to be used in manufacturing iron from ore raised out of another mine belonging to the same person, it was held that the coal-mine was rateable, *Rex v. Cunningham. (b)*

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against
The Overseers
of BILSTON.

BAYLEY J. I am of opinion that the court of quarter sessions came to a right conclusion. This appears to me a very plain case. The carding engine and weighing machine were each considered as part and parcel of a building, and were rated as such. So, also, in the case of the canteen; the privilege of selling liquors was considered as annexed to the house, and as forming part of its value. Here, a person working a mine in his own land, has erected an engine for the purpose of working that mine, and which is of no other use. The occupier of the mine, as such, is not rateable under the provisions of the 43 *Eliz. c. 2*. In many such mines there are rail-roads under ground, which greatly enhance the value of the mine, and therefore of the land,

(a) 7 T. R. 508.

(b) 5 East, 476.

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The Overseers
of BILSTON.

but they cannot be rated, and, in principle, they are on the same footing as this engine. This is a mode of drawing the water from the mine; the rail-road is to facilitate the conveyance of the ore to the foot of the shaft. Each is of use in carrying on the mining operations, but of no other use. Suppose a conveyance or lease of this mine, with the machinery, had been made, it is clear that the engine would have passed to the grantee or lessee; it must, therefore, be considered as part and parcel of the mine, and is, as well as the mine itself, exempt from poor-rates.

HOLROYD J. I likewise think it clear that the sessions were right. The engine was not profitable, but burthensome, except as it respected the mine itself. As it regarded the land, independently of the mine, it was clearly burthensome. Now the profits arising from the mine are exempt from taxation under the 43 *Eliz. c. 2.* The engine is, therefore, in like manner, exempt.

LITLEDALE J. concurred.

Order of sessions confirmed.

1826.

DOE on the Demise of the Earl of DARLINGTON
against BOND and Others.

EJECTMENT for premises in *Camelford* in the county of *Cornwall*. Plea, the general issue. At the trial before *Gaselee J.* at the *Cornwall* Spring assizes, 1826, it appeared, that in 1805, the premises in question had been demised to one *Abel Uglow*, by the trustees under the will of Sir *W. Molesworth*, for ninety-nine years, determinable on three lives, which were still in being. In 1819 the lessor of the plaintiff became assignee of the reversion, and in 1823 the Marquis of *Hertford*, under whom the defendants held, became assignee of the lease. The premises, at the time of the demise, consisted of a building one story high, occupied as two tenements, and a back lin-hay or bullock-house, and a garden. In the lease, there was a proviso that, "if the lessee, his executors, administrators, or assigns, should commit, or permit any manner of waste in or upon the demised premises to the value of 10s., and the same did not amend, or other satisfaction for the same give within three months after notice, the lessor might re-enter." In October 1824, certain alterations were commenced by order of the Marquis of *Hertford*. The building, before occupied as two tenements, was raised, and converted into five separate dwellings. The back lin-hay or bullock-house was pulled down, the materials of which were worth 10*l.*, and the workmen began to erect a building on the site, which was intended for three cottages; but before it was completed,

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10s., and the lessor re-entered, and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10*s.* value, and substituted others of a different description: Held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury, whether, under all the circumstances, such waste to the value of 10*s.* had been committed.

BAYLEY J. It seems to me that the meaning of the proviso is, that the lessor shall be at liberty to re-enter if waste be done, producing an injury to the reversion to the value of 10s., and the same be not amended or satisfaction made for it within three months after notice. But in this case it was possible that the value of the reversion might be increased by the alteration; it was, therefore, a question for the jury, whether waste to the value of 10s. had been committed. As that question was not submitted to their consideration, I think that the rule for a new trial must be made absolute.

1826.

Doct. dam.
Earl of
DARLINGTON
against
Bond.

HOLROYD and LITTLEDALE Js. concurred.

Rule absolute.

C. F. Williams was to have supported the rule.

HENRY SIMMONS *against* HEZEKIAH SWIFT.

INDEBITATUS assumpsit for bark sold and delivered, the usual money counts, and a count upon an account stated. At the trial before *Littledale J.*, at the Spring assizes for the county of *Monmouth*, 1826, the jury found a verdict for the plaintiff for the sum of 106*l.* 3*s.* 8*d.*, subject to the opinion of this Court upon the following case. The plaintiff and defendant were

Where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed

and delivered to him: Held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary, in order to ascertain the amount to be paid, and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered.

Semble, That an action for goods bargained and sold could not, under such circumstances, have been maintained, per *Littledale J.*

both

1826.

SIMMONS
against
SWIFT.

both dealers in timber and bark, the plaintiff residing at *Whitebrook*, in *Monmouthshire*, and the defendant in the town of *Monmouth*. Previously to the 23d of *October* 1824, the plaintiff was possessed of a quantity of oak bark, which was stacked at a place called *Redbrook*, on the banks of the river *Wye*, about two miles below the town of *Monmouth*, and which in *July* preceding weighed twenty tons. Upon the 23d of *October* the following agreement for the sale of the said bark was signed by the plaintiff and the defendant. "I have this day sold the bark stacked at *Redbrook*, at 9*l.* 5*s.* per ton of twenty-one hundred weight, to *Hezekiah Swift*, which he agrees to take, and pay for it on the 30th of *November*."

It was afterwards verbally agreed between the parties, that one *William Simmons*, a brother of the plaintiff, should see the bark weighed on behalf of the plaintiff, and one *James Diggett* should see it weighed on behalf of the defendant. Within five days after the signing of this agreement, the defendant sent several of his barges and his servants to *Redbrook*, and took a quantity of the bark, amounting to 8 tons 14 cwt. He sent for *William Simmons*, who was at work in a wood near to *Redbrook*, to see the bark weighed on behalf of his brother, which *William Simmons* accordingly did, and was paid for his trouble by his brother's wife. *William Simmons* said he was not directed by his brother to see the bark weighed, and did not know that it had been sold until he was fetched from the wood by the defendant's messenger. *James Diggett* attended the weighing on the part of the defendant. The bark so taken by the defendant was carried by his barges down the river *Wye* to *Chepstow*. The remainder of the stack was covered with a tarpaulin belonging to the defendant,

but

but which tarpaulin had been upon the premises at *Redbrook*, having been lent by the defendant for that purpose to the person who sold the bark to the plaintiff; and had been used to cover a part of the stack before the signing of the agreement by the plaintiff and defendant. About eight or nine days after part of the bark had been so removed by the defendant, a Mr. *James Madley*, upon whose premises at *Redbrook* the bark was stacked, met the defendant, and asked him when he intended to take the remainder of the bark away, as it was stacked over part of a sawpit which he (*Madley*) wanted to use; the defendant answered that he should have it taken away in a few days. The defendant did not at any time take away the remainder of the bark, nor was it weighed. Towards the latter end of *November* there was an extraordinary flood, which overflowed the banks of the river *Wye*, and rose nearly to the height of five feet around the remainder of the stack of bark, and did it very considerable injury. There was sufficient time for the defendant to have removed the whole of the bark before the flood happened. The defendant was seen examining the remainder of the bark after it had been injured by the flood, and the tarpaulin before mentioned remained upon the bark until the 28th of *January* 1825, when it was removed by some of the defendant's servants who were passing up the river in a barge. On the 4th day of *December* 1824, the plaintiff called at the defendant's counting-house, and the defendant said he was ready to pay for the bark which had been removed, viz. 8 tons 14 cwt., and by the plaintiff's direction an account was made out of the bark which the defendant had taken away as aforesaid, and the defendant paid the amount by a check,
which

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against
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decision of *Hanson v. Meyer* several cases somewhat similar have occurred, in which it was held that goods contracted for had not vested in the purchaser, *Rugg v. Minett* (a), *Wallace v. Breeds* (b), *Austen v. Craven* (c), *White v. Wilks* (d), *Busk v. Davis* (e), *Shipley v. Davis* (f); but in each of them it was made necessary, either by express contract or by the usage of trade, that some further act should be done by the vendor before the goods were transferred to the purchaser. [*Bayley J.* When did the delivery in this case take place?] As soon as the vendee took away a part of the goods. In 2 *Bl. Com.* 448. it is said, "As soon as the bargain is struck the property of the goods is transferred to the vendee, and that of the price to the vendor, but the vendee cannot take the goods until he tenders the price agreed on." [*Holroyd J.* The declaration is for goods sold and delivered, not for goods bargained and sold.] If the property vested in the defendant, then a delivery of part was clearly a delivery of the whole.

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 SIMMONS
 against
 SWIFT.

Campbell contra. This action for goods sold and delivered cannot be maintained unless the plaintiff makes out not only that the property in the whole of the bark vested in the defendant, but also that the whole was delivered. He must show that he had divested himself of all lien upon the bark, and that the defendant might have maintained trover for it, without paying or offering to pay the price, *Goodall v. Skelton*. (g) This case is directly within the authority of *Hanson v. Meyer*, the

(a) 11 *East*, 216.(c) 4 *Taunt.* 644.(e) 2 *M. & S.* 397.(g) 2 *H. Bl.* 316.(b) 13 *East*, 522.(d) 5 *Taunt.* 176.(f) 5 *Taunt.* 617.

bark

vary the nature or quantity of the commodity before delivery; that was to be done by the seller. In other cases the thing sold was to be separated from a larger quantity of the same commodity. This case was different; the subject matter of the sale was clearly ascertained. The defendant agreed to buy the bark stacked at *Redbrook*, meaning, of course, *all* the bark stacked there; but it was to be paid for at a certain price *per ton*. The bargain does not specify the mode in which the weight was to be ascertained, but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. He might insist upon keeping possession until the bark had been weighed. If he was anxious to get rid of the liability to accidental loss, he might give notice to the buyer that he should at a certain time weigh the bark, but until that act was done it remained at his risk. In *Hanson v. Meyer* weighing was the only thing that remained to be done, there was not any express stipulation in the contract that the starch (the subject matter of that contract) should be weighed; that was introduced in the delivery order, but the nature of the contract made it necessary. So here the contract made weighing necessary, for without that, the price could not be ascertained. Suppose the plaintiff had declared specially upon this contract, he must have alleged and proved that he sold the bark at a certain sum per ton, that it weighed so many tons, and that the price in the whole amounted to such a certain sum. The case of *Hanson v. Meyer* differs from this in one particular; viz. that the assignees of the vendee who had become bankrupt were seeking to recover the goods sold; but the language of Lord *Ellenborough* as to the necessity

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 SIMMONS
 against
 SWIRE.

which expression I take to have been used with reference to the then question, viz. whether the property had so vested in the purchaser as to entitle his assignees to claim the delivery. So in this case, although the property might vest in the purchaser, it would not follow that he could enforce a delivery until the weight of the bark had been ascertained, and the price paid. Here there was not a delivery in fact, nor was the delivery of part a constructive delivery of the whole. This differs from the cases of lien or stoppage in transitu, in which it may be considered, that a delivery of part is in the nature of a waiver of the lien, or right to stop in transitu. I think further, that an action for goods bargained and sold would not lie merely because the property passed. The mere bargain would not suffice, because no specific price was fixed, nor could the plaintiff recover on a quantum valebat; for the contract was to pay by weight; and, therefore, until the commodity was weighed there would be nothing to guide the jury in the amount of damages to be given. The seller was at all events bound to offer to weigh the bark, but he never did so. For these reasons I think he cannot recover.

Postea to the defendant.

1826.

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against
SWIFT.

take the rents, issues, and profits of all and every of the said premises, except as aforesaid, to her and their own use and benefit, for and during the term of her natural life, free and clear of and from her said husband, *Jacob Creber*, and so that he may not intermeddle therewith, and that the same may not be subject or liable to the payment of any of his debts; and from and after her death, then I give, devise, and bequeath the same and every part thereof, unto the heirs of the body of the said *Joan Creber*, share and share alike, their heirs and assigns for ever." The testator died so seised in *January* 1766, without altering or revoking his will, leaving the said *Jacob Creber* and *Joan* his wife him surviving. *Joan Creber*, at the death of the testator, had one child, *Richard*. She subsequently had eleven other children, and died in 1811. The first five, the seventh, tenth, and eleventh died in her lifetime intestate and without issue. *Mary*, the sixth, and *Henry*, the ninth, are represented by the defendant *James*, who was the twelfth and last child, their interest having been duly conveyed to him. Both survived their mother, *Joan Creber*. *William*, the eighth, died in 1800, but he left two daughters now living, who are the lessors of the plaintiff. *Henry* was the eldest surviving son at his mother's death, but *William* was his elder brother, and represented by his daughters.

The said *Jacob Creber* the father, the husband of *Joan Creber*, the devisee named in the will, died in *April* 1806, and upon his death, the said *Joan Creber*, his wife, went and lived upon the said premises called *Sowton*, with her son *James Creber*, the defendant, who rented the same of her at 32*l.* per annum, from thence to the time of her

1826.

 RIGHT
against
CARRER.

1826.

 RIGHT
 against
 CARRER.

death, which happened on the
 and has ever since remained in p

R. Bayley for the lessors of
Creber took an equitable estate
 quent devise to the heirs of her
 estate, it must be conceded
 coalesce. (a) Then the lessors
 purchase contingent remainders,
 daughters of the eldest son of
 description of heirs of the bod
 time of her death, *Newcomen v.*
Barnes. (c) They can fulfil th
 share and share alike, for, but
 would have taken jointly. The
 to the whole. But assuming th
 the body" are not to be constr
 sense, but that in this will they
 comprehend grandchildren, the l
 then entitled to recover nine tw
 of the case, *Richard*, the eldest
 mainder upon the death of the
 and let in the children subsequ
Karver (d), *Doe v. Perryn* (e), *M*
Joan had twelve children, eight c
 out issue, and their shares descen
 plaintiff. In *Gretton v. Howard* (f)
 his wife his real estate and person
 his debts and funeral expences,

(a) *Fearne*, 52.

(c) 4 *Burr.* 2157. *S. C.* 664.

(e) 3 *T. R.* 484.

(g) 6 *Taunt.* 94.

the heirs of her body, share and share alike, if more than one, and in default of issue by the testator, to be at her own disposal; there were children of the testator and his wife, and it was held that the wife took an estate for life with remainder to all the children as tenants in common in fee.

1826.

Rader
against
Casson.

Coleridge contra. First, the devise being to the heirs of the body of *Joan Creber*, share and share alike, their heirs and assigns, created a joint tenancy, or a tenancy in common. Secondly, the remainder did not vest until the death of the tenant for life, and consequently the lessors of the plaintiff are not entitled to more than one fourth. The words of the will, "the heirs of her body, share and share alike, their heirs and assigns for ever," prevent its being a tenancy in severalty, for if that construction were adopted, no effect would be given to these words, and there is no reason for rejecting them. For as the first estate was only for life, there is no reason in law why the children, being purchasers, should not take jointly or in common, nor is there any thing to show that that was not the intent of the testator, for if the remainder had even vested, upon the testator's death, in *Richard*, the only son, it would open to let in the other children as they came in esse, either as joint tenants or tenants in common, *Doe v. Perryn* (a) is in point. There three children were born subsequently to the testator's death, and the remainder was held to vest in the first-born, subject to opening. What is true of him would be true of *Richard* here; if the remainder vested on the testator's death, it would open to let in the other

(a) 3 T. R. 484.

other instances of the same kind given in *Fearne*, 212. In *Grettan v. Haward* (a) the testator was the husband, and left six children him surviving; as he directed the estate to be divided, he could not be supposed to disinherit any child dying before his widow. In *Edwards v. Symons* (b) the term was “children,” not *heirs*. Then, if it be an exception to the general rule, to make the children take as heirs, living the ancestor, there are no circumstances here to bring the case within the exception; and if that be so, then the remainder did not vest till the death of the tenant for life, and the lessors of the plaintiff are entitled to one-fourth only.

1826.

 RIGHT
against
CARRER.

BAYLEY J. I am of opinion that the lessors of the plaintiff are entitled to recover, not the whole, but nine-twelfths only of the estate devised by the testator. It has been insisted that they were entitled to recover the whole, on the ground that the words “heirs of the body” were used in a strict legal sense, and that they applied to the lessors of the plaintiff, who, as the daughters of the eldest son of *Joan Creber*, were the only persons who answered that description; and that would be true, if there were nothing on the face of the will to show that the testator used those words in a different sense. But here there are the words “share and share alike,” which show that the testator did not mean the property to go to the eldest male issue only, which he must have intended if the words “heirs of the body” be taken in a strict legal sense. It has been said that those words were not used in a strict legal sense to denote the eldest male issue, but that the testator may

(a) 6 Taunt. 94.

(b) 6 Taunt. 213.

1826.

 RIGHT
 against
 CREBER.

have contemplated a state of things which actually has happened, we should leave two daughters, who are the body of *Joan Creber*, and share alike. I think that is a state to be supposed to have been in the mind of the testator. The words "heirs of the body" in the strict legal sense, we are bound to construe in the sense in which they were used. If the testator intended that the children should be maintained, then the will must receive its effect as if words apt and proper to express that intent had been used in the will, instead of "heirs of the body," or as if those words had been used in the sense in which they were used. If the heirs of the body were not used, the first question is, in what sense were they used? I think they were used in a sense expressed by the words "descendants."

That being so, if the testator intended that his children or issue, which are the body, should express the sense in which he used the words "heirs of the body," then, according to the construction of the estate limited to the children, the remainder in fee, which, on the birth of that child, subject to open and accumulate for children born afterwards. It is a settled rule that a remainder can be construed to be vested, if it is to be considered vested, and in this case if the remainder be continued until the death of the testator, defeated by the destruction of the body, in this case the remainder was continued until *Creber* lived, the trustees might

destroying their previous estate. Each taker might dispose of his remainder, whether vested or contingent. But if it was contingent it might be destroyed. I am, therefore, of opinion that the remainder vested, upon the death of the testator, in *Richard Creber*, and that it opened on the birth of each child, who immediately took a vested remainder in its share; and that eight having died without disposing of their shares, they vested in the lessors of the plaintiff as the representatives of the eldest brother. The several cases cited as to the application of the rule *nemo est hæres viventis*, do not apply to the present case, because in those cases there was nothing to shew that the testator intended to use the words "heirs of the body" in any other than the strict legal sense, but where it can be collected from expressions in the will, that those words are used in a different sense, as a designation of a person, then the remainder vests notwithstanding the general rule, that *nemo est hæres viventis*, as where the limitation to the heirs special was qualified by the words *now living*, *Burchett v. Durdant* (a), or some other circumstances, have appeared in the will to manifest the testator's intention that the estate should vest, *Long v. Beaumont* (b), *Goodright v. White*. (c) I think that there is in this case sufficient on the face of the will to shew that the words *heirs of the body* were used to denote children, and, therefore, that it was the intention of the testator, that the remainder should vest in the first-born child, subject to open and let in the other children as soon as they came into esse. That being so, the lessors of the plaintiff are entitled to recover nine-twelfths of the property.

1826.

 Right
 against
 GARNER.
(a) *Carth.* 154.(b) 1 *Peere W.* 229.(c) 2 *Black.* 1010.

1826.

RIGHT
against
CREBER.

HOLROYD J. I think that the children are entitled to recover nine-tenths of the property. The words "heirs of the body" are to be construed in the remainder would not vest in the children. If they are to be construed in the remainder, the rule *nemo est hæres vivens* must be applied, because the will must be construed in the devise the word "heirs" is used in the words "heirs of the body." The testator meant those children living at the death of *Joan Creber*. The will shows that that was his meaning, and share alike," and "their children," that the words "heirs of the body" are to be construed in the strict legal sense. It appears from *Gretton v. Haward* (a), which is the present case, those words mean "children;" and that being so, the testator gave a remainder vested in *Ridgway* *pro tanto* on the birth of every child, in its nature, because there was no limitation but the birth of children; and the will to shew that he did not mean to give a remainder, therefore, that by the words "heirs of the body" the testator intended all the children living at the death of *Creber*, merely those who were living at the death of *Creber*.

LITTLEDALE J. concurred.

Ju

(a) 6 Taunt

1826.

The Duke of SOMERSET *against* FOGWELL.

TRESPASS for breaking and entering the plaintiff's close called the *River Dart*, in the parish of *Berry Pomeroy*, in the county of *Devon*, between a certain place called *Hem's Mouth* and a certain place called *Penny's Quay*, and taking the plaintiff's fish therein. Second count for breaking and entering the several fishery of the plaintiff in the river *Dart*. Third count for breaking and entering plaintiff's free fishery. Fourth count de piscibus asportatis. Plea, general issue. At the trial before *Burrough J.* at the Spring assizes for the county of *Devon*, 1826, the plaintiff gave in evidence letters patent of the 44 *Eliz.*, by which she granted to *Edward Seymour, Esq.*, his heirs and assigns, "all those domain lands and manors of *Berry Pomeroy* and *Bridge-town Pomeroy*, and the castle of *Berry Pomeroy*, with all their rights, members, liberties, and appurtenances in the county of *Devon*, then lately parcels of the lands and possessions of *Edward* late Duke of *Somerset*, and once parcels of the lands, possessions, and hereditaments of *T. Pomeroy, knight*;" and, after making use of general words to pass the lands, &c. and tithes of *Berry*, her majesty granted "all waters, fisheries, &c. to the aforesaid manors, castle, and premises, and to each and every of them belonging or appendant, known, accepted, held, used, or reputed or deemed as part or parcel of the same premises." The letters patent then granted to the aforesaid *E. Seymour*, his heirs and assigns, the aforesaid manor, castle, messuages, lands, &c., and all

Where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must be presumed) before magna charta, by the description of "separalem piscariam," that is an incorporeal and not a territorial hereditament, and a term for years in it cannot be created without deed. Semble, that the owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be owner of the soil.

and that *Mills* was in possession of the fishery under such lease at the time of the trespass complained of; and that the action, therefore, ought to have been brought in his name, and not in that of the duke, and an agreement in writing, but not under seal, was given in evidence.

It was dated on the 7th *May* 1824, and the duke thereby agreed to let, and one *N. Mills* agreed to take all his the said duke's fishery, of whatsoever nature, kind, or description the same might be, and to which the duke, at law or in equity, was entitled in, upon, and out of the river *Dart*, and the adjacent shores and banks of the same river, in the county of *Devon*, with all rights, privileges, and appurtenances whatsoever attached to or appurtenant to the said fishery, as fully and amply as the said duke was entitled to the same; and also all that sand bank situate and lying in the parish and manor of *Berry Pomeroy*, in the county of *Devon*, habendum to *N. Mills*, his executors, &c. from the 25th day of *May* then last past, for three years, yielding and paying therefore unto the duke, his heirs and assigns, the yearly rent of 40*l.* on the days therein mentioned; and also yielding and paying to the duke, his heirs and assigns, the yearly rent of 5*s.* on the days and in the manner aforesaid, for and in respect of the said bank.

The learned Judge was of opinion, that there was evidence for the jury to presume that there had been before the reign of *Henry* the Third, a grant of the exclusive right of fishing in the river *Dart*, which was then vested in the plaintiff, and that as it was a right in a navigable river where the tide flowed and reflowed, it was an incorporeal hereditament which lay in grant and not in livery, and that a term for years could not be created in it without deed. And he directed the

jury

1826.

The Duke of
SOMERSET
against
FOGWELL.

Hargrave in his note to that passage. The true distinction between a several and free fishery is thus pointed out by Lord *Mansfield* in *Seymour v. Lord Courtenay*. (a) "In order to constitute a several fishery it is requisite that the party claiming it should so far have the right of fishing independent of all others, as that no person should have a co-extensive right with him in the subject claimed, for where any person has such co-extensive right there it is only a free fishery." Now the Duke of *Somerset* exercised an exclusive right in the place in question, and the chirographs of the fines describe the fishery as a several fishery. The right, therefore, is properly described in the second count, and trespass is the proper remedy for an injury to that right. For in order to maintain trespass, it is sufficient if the party at the time when the act complained of, is done, has the actual or constructive possession of the thing which is the subject of the trespass, *Smith v. Miller*. (b) The owner of a several fishery has the exclusive right of taking the fish within particular limits, and thereby has the constructive possession of all fish within those limits, and may, therefore, in trespass, describe them as *his* fish, *Smith v. Kemp* (c), *Child v. Greenhill* (d), *Sutton v. Moody* (e), *Seymour v. Lord Courtenay*. (f) So the grantee of waifs, estray and wreck within a manor, or of felon's goods within a hundred, may before seizure by him maintain trespass against a wrong doer. (g)

1826.

The Duke of
SOMERSET
against
FOGWELL.

(a) 5 Burr. 2814.

(b) 1 T. R. 480.

(c) 2 Salk. 637.

(d) Cro. Car. 553.

(e) 1 Ld. Raym. 250.

(f) 5 Burr. 2814.

(g) F. N. B. 91 b. 91 D. 91 F.

Selwyn, contra. It may be conceded that a several fishery may exist distinct from a property in the soil, and where that is the case, that such several fishery being distinct from the ownership of the soil, may be considered as an incorporeal hereditament lying in grant, and not in livery; and in that case that no demise of it can be made but by deed. The question, whether a several fishery necessarily includes in it ownership of the soil or not, is fully discussed by Mr. *Hargrave* in his note to *Co. Litt.* 122.(a), where, after stating the several authorities and arguments upon the subject, he says, "Hence as it should seem the arguments are short of the purpose, for at the utmost they only prove that a *several piscary* is *presumed* to comprehend the soil, till the contrary appears, which is perfectly consistent with Lord *Coke's* position, that they may be in different persons, and, indeed, appears to be the true doctrine on the subject." Then if that be so, as the Duke of *Somerset* had a several fishery, it must be presumed that he had the soil also, because the contrary was not shewn; and if he had the soil, he might put himself out of possession of it by a parol demise, and the words of the agreement, "all his the said fishery," were sufficient to convey to *Mills* the right in the soil. And if that be so, then this action ought to have been brought in his name.

1826.

The Duke of
Somerset
against
Foswell.

Cur. adv. vult.

The judgment of the Court was now delivered by

BAYLEY J., who (after stating the pleadings) proceeded as follows. The material question in this case was, whether the plaintiff had, by his agreement entered into with *Mills*, put it out of his power to maintain the

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action.

62. and in *Vin. Abr. Grant* (G. a.) this passage is cited, with the word *vill* instead of *villeine*, but that is clearly a mistake. In 2 *Roll. Abr.* 63. pl. 14. it is said that a parson cannot grant his tithes to a stranger for life or for years without deed, because it is entirely in grant; and pl. 16. shows, that it makes no difference whether the grant be for one year or for several. In pl. 17. a distinction is taken between a grant of tithes to a stranger and to the owner of the land. In the latter case it may be without deed, because it is in the nature of a composition for the tithes retained, and not a grant of tithes. In *Vin. Abr. Grant* (G. a.) pl. 29. *Godb.* 74. is cited, where it is said arguendo, that a warren may be demised without deed; and reference is made to the 9 *Ed.* 4. 47. There may be a difference according to the sort of warren leased, viz. where a warren with the land is leased (in which case by the warren the land would be intended), and where the franchise only is demised. In the former case the lease might be good without deed; and if that was the nature of the lease spoken of in *Godb.* the position is correct, otherwise not; and in 9 *H.* 4. 47. it is said that warren cannot be leased without deed; and the same is laid down in *Bro. Abr.* tit. *Lease*, pl. 12.; and this doctrine is adopted in *Saunders v. Owen.* (a) The question then is, whether the subject matter of the agreement between the plaintiff and *Mills* lay in grant, as an incorporeal, or in livery as a corporeal thing. No conveyance of the right of fishery or of the soil was produced at the trial, but it appeared not to be an ordinary fishery resulting to the owner of the adjoining land in respect of the land, but a fishery

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(a) 2 *Salk.* 467.

and to use such means as are necessary for that purpose, which is in truth nothing more than a liberty to fish: the grantee has no property in the water, none in the soil. And this is the case where the grant is made between subject and subject, and, consequently, is to be construed against the grantor, a principle inapplicable to grants made by the crown, whereby nothing passes, unless the intention that it should pass is manifest. In the great case of the fishery of the *Banne* (a), it appeared, that the king had the fishery of the *Banne*, a navigable river, as parcel of the ancient inheritance of the crown; and *Jac.* 1., by letters patent, granted to Sir *R. M'Donnell* in fee the territory of *Rout*, parcel of the county of *Antrim*, and adjoining to the river *Banne*, in that part where the fishery was; and by the letters patent the king granted “omnia castra messuagia, &c. piscarias, piscationes, aquas, aquarum cursus, &c.,” and it was held, that the fishery of the *Banne* did not pass by the grant of the land adjoining, and by the general grant of all piscaries; for that it was a royal fishery not appurtenant to the land, but a fishery in gross, and was by itself part of the inheritance of the crown; and that general words in a grant by the king would not pass such a special royalty, which belonged to the crown by prerogative. And it was further agreed, that the grant of the king passes nothing by implication. In the present case it appeared, by the fines given in evidence (which were probably in the language of the original grant) that the Duke of *Somerset* had nothing more than a fishery, without the property of the soil or the water; for that would have been the case even had the grant

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been made by a subject, and therefore *a fortiori* he could take nothing more by a grant from the crown. It was contended in argument, that the owner of a several fishery must be presumed to be the owner of the soil. That may be true where the terms of the grant under which he claims are unknown; but when they appear, and are such as convey an incorporeal hereditament only, the presumption is destroyed. If, then, the grant to the Duke of *Somerset* gave nothing more than an incorporeal hereditament, of course that alone could be granted by him. He does not, indeed, profess to grant more, the agreement putports to grant the fishery only, and that agreement not being under seal, could not operate as a demise for years of that which lies in grant. That being so, *Mills* took nothing under the agreement; the right of the Duke of *Somerset* remained in him at the time of the trespass, and the action is consequently maintainable.

Rule discharged. (a)

(a) *Hoskins v. Robins*, 2 Saurd. 528. 12)

The KING *against* HUGHES.

By the governing charter of a borough, there were to be ten aldermen and ten capital burgesses, and vacancies in the body of aldermen were to be filled up out of the capital burgesses: Held, that the acceptance of the office of alderman by a capital burgess, even under a void election, operated as a surrender of the latter office; and that a person so elected, and afterwards ousted on quo warranto, was not thereby restored to the office of capital burgess: and, therefore, where a capital burgess became an alderman *de facto* by means of a void election, and in the character of alderman attended and voted at an election of a mayor, but was afterwards ousted on quo warranto: Held, that he could not be considered as having attended and voted as a capital burgess.

INFORMATION in the nature of a quo warranto against the defendant for usurping the office of mayor of the town and borough of *Stafford*. The defendant's plea set out a charter of the 12 Jac. 1. by which the

king

king granted to the bailiffs and burgesses of *Stafford*, that they should be a body corporate, and that there should be a mayor, ten aldermen, and ten capital burgesses, and then averred acceptance of the charter, and that the defendant was elected and sworn mayor according to the directions of the charter. There were several replications to this plea, upon which several issues both in law and in fact were raised. The only issue in fact which is material to the question decided by the Court was, whether at the defendant's election in 1825 there were present a majority of the capital burgesses. At the trial before *Park J.* at the Spring assizes for the county of *Stafford* 1826, the facts, as far as they relate to that issue, were as follows: By the charter, the corporation was to consist of a mayor, ten aldermen, and ten capital burgesses; and vacancies in the body of aldermen were to be filled up out of the capital burgesses. On the 24th *October* 1825, the defendant was elected mayor. There were present at the election four capital burgesses and eight aldermen, including two persons named *Turnock* and *Knight*, but an information in quo warranto was filed against them, charging that they, on the 20th of *September* 1824, exercised the office of aldermen, and they were removed from that office by judgment of ouster in *Hilary* term 1826. *Turnock*, on the 20th of *September* 1824, had been elected an alderman, and on the same day, in his stead, one *Rogers* was elected a capital burgess. *Turnock* concurred in the election of *Rogers*, and the latter executed the office of capital burgess ever after, and *Turnock* continued from that time to exercise the office of alderman till the judgment of ouster. On the 14th of *October* 1821, *Knight* was elected an alderman, and in his stead one *Hawthorn* was elected a capital burgess.

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Knight concurred in that election ever after as a capital burges. *Hawthorn* were elected burges number of ten, exclusive of *Th* had been elected aldermen.

justice in *October* 1824, and was to serve the office until he was elected and sworn in a justice in and again in 1823. By the termson cannot be elected a justice. Upon this it was insisted, that defendant as mayor in 1825 was present at his election four whereas there ought to have been hand, it was contended that *Th* were present at the election and were not, in point of law, aldermen they had never ceased to be capital that were so, that there were present capital burgesses and six aldermen inclined to think that *Turnock* to be capital burgesses, but he gave a verdict for the defendant, with to move to enter a verdict for having found accordingly, a ruling *Campbell* in last *Easter* term to crown, against which

Oldnall Russell and *Bayly Knight* and *Turnock* at the election in 1825 were not a judgment of ouster against the is conclusive to show that in law men de jure, and in fact the

aldermen, *Rex v. The Mayor of York* (a), and per *Holroyd J.*, in *Rex v. Hughes*. (b) Then if that be so, they were remitted to their original character of capital burgesses, and must be considered as having given their votes in that character, which they might rightfully do, and not in one in which they would be acting wrongfully. It may be conceded that the acceptance of the office of alderman, where the election is valid, and the acceptance gives a perfect title, operates as an implied surrender of the office of capital burgess. But in this case the party never acquired a legal title to the office of alderman, and therefore cannot be supposed to have intended to vacate the first office. The acceptance of a new lease by a lessee for years will, generally speaking, operate as the surrender of a prior lease. But if the new lease be void, acceptance of it by the lessee does not operate as a surrender, *Com. Dig. tit. Surrender, I. 1, 2., Roe d. Lord Berkeley v. The Archbishop of York*. (c) Besides, a corporate officer who accepts an office incompatible with another, does not surrender, but vacates the first office; and then the presumption is that he intended to resign the first, provided that he was legally admitted to the other office. Here *Turnock* and *Knight* never acquired a good title to the office of alderman, and, therefore, they cannot be supposed to have resigned that of capital burgess.

BAYLEY J. I am of opinion that the defendant has not been duly elected in this case, and that the verdict must be entered for the crown. It is conceded that, in order to make a good election, there must be present

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(a) 5 T. R. 66.

(b) 4 B. & C. 368.

(c) 6 East, 86.

alderman and capital burgess are incompatible. These parties accepted the offices of aldermen; they were sworn into them; they discharged all the duties of them, and if six years had elapsed they would have been unimpeachable aldermen. There is no hardship on them in holding, that the legal result of this is, that they ceased to be capital burgesses. On the contrary, a great hardship would result to other parties if they were at liberty now to say, that they never ceased to be capital burgesses. One consequence among others would be, that every act done by the parties introduced into their places as capital burgesses, would be illegal. If, in common council, they concurred in giving an opinion or a vote, they would be liable to be ousted by *quo warranto*, and treated as wrong doers. Besides, on the election of these two persons as aldermen, the corporation state there is a vacancy in the office of capital burgesses. *Knight* and *Turnock* concur in making that statement, and *Foxke* and *Rogers* are made burgesses. Then who ought to suffer, the party who is deceived, or the party who lends himself to mislead? It is the duty of a person elected to the office of alderman to ascertain whether he is legally elected or not. He is a party to the election, and he, at his peril, is bound to take care that it is a valid election before he accepts the office; and if it turns out that he accepted it improperly, is he to be restored to every thing which he had previously given up? and is the individual introduced into his place to be treated as a wrong doer and to be entirely removed? Suppose there was a compensation for the discharge of the duties of a capital burgess, who ought to have it? Clearly the man who from the year 1821 down to the election in 1825 discharged these duties, and not that man who has abstained from these duties,

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again to the office which you previously vacated, but that is still well filled by the person introduced into it in your stead. For these reasons, I am of opinion that *Rogers* and *Hawthorn* were good capital burgesses (though it is not necessary to decide that question), but that neither *Turnock* or *Knight* was a capital burgess at the time of the election in 1825, and, therefore, the requisite number of capital burgesses was not present at the time of that election, and consequently the rule for entering a verdict for the crown must be made absolute.

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HOLROYD J. I am of the same opinion. It does not appear to me that the least doubt can be entertained upon this question. I think that when *Turnock* and *Knight* accepted the office of aldermen to which they were elected (whether legally elected or not), and when they took upon themselves to perform the duties of the office to which they were admitted, they virtually ceased from that moment any longer to fill the office of capital burgesses. The charter directs that there shall be a certain number of aldermen and a certain number of capital burgesses. It is admitted that if any of the capital burgesses are removed so as to become good aldermen, they cease to be capital burgesses from the time when they accept the office of aldermen. It appears to me, too, that if any of the capital burgesses take upon themselves the office of aldermen, so as to be aldermen de facto, they cease to be capital burgesses from the moment when they take upon themselves the office of aldermen. If the acceptance of the office of aldermen did not operate as a vacating of the inferior office, there might, under the circumstances mentioned by my brother *Bayley*, be more than the full number of capital

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capital burgesses required by the charter, or two per must have filled the same office at the same time, which law cannot be. That circumstance appears to me to be decisive of the present question. The effect of the 32 G. 3. c. 58. s. 1. is, that the capital burgesses who have performed the duties of that office for the space of six years cannot be removed. And as by the charter the same person cannot at the same time fill the office of alderman and that of capital burgess, it follows that the aldermen de facto could not during that period hold the office of capital burgesses, but that from the moment of their acceptance of the office of aldermen they must have ceased to be capital burgesses; and thus the lower office become vacant by a man's acceptance of the higher, his subsequent removal from the higher office does not reinstate him in the inferior, which another person holds, and which, if he continues to hold for six years, he cannot be ousted from. The rule for entering a verdict for the crown must therefore be made absolute.

LITLEDALE J. I am entirely of the same opinion. In this case, in order to make a valid election, it is necessary that there should be present six capital burgesses. In point of fact there were only four persons who at that time were in possession of and discharged the duties of that office. But it is insisted, as there were present two other persons who were then discharged the duties of aldermen, but who afterwards appeared by a judgment in quo warranto to have had no right to act as aldermen, that these two persons are there remitted to their original character of capital burgesses and that although they appeared at the election in their chara

character of aldermen, yet that the law would refer their votes to the legal right which they had, and would, therefore, consider them as given in their character of capital burgesses. The question is, whether at the time of the election they were in point of law capital burgesses. The general rule is, that if a man accepts an office incompatible with another, it operates as an abandonment or deprivation of the first office. In the *King v. Trelawney* (a), Lord *Mansfield* intimates an opinion (though the point is not there decided) that if the two offices of steward and burgess are incompatible, the acceptance of the latter would imply a surrender of the former. I entirely concur in that opinion. It seems to me to be founded upon reason and principle, and great confusion would be produced if it were not so. It is conceded, that if the office accepted be one to which the party has a good title, such acceptance will operate as a surrender or deprivation of the first office; but it is said that the acceptance will not have that effect, unless the office accepted be one to which the party elected can make a title. It seems to me, that if the acceptance of an incompatible office to which the party elected has a good title, operates as a surrender or deprivation of a former office, that the acceptance of such an office to which he has no title will have the same legal effect upon the well known principle, that a party shall never be permitted to take advantage of his own wrong. It is the duty of the party elected, to ascertain before he accepts an office whether he is legally entitled to it, and if he accept it without having title, the very acceptance of it is a wrongful act, and the law considers him a wrong

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(a) 3 Burr. 1616.

doer,

cient. In support of such an issue the first piece of evidence would be that *Turnock* and *Knight* had been elected into a new office; but that would not be of itself sufficient, for they might not think proper to accept it. The next piece of evidence would be that they were sworn in, — that is an act of their own; then that they actually discharged the duties of the office; and further, that they voted for the persons who were to succeed them respectively in the office of capital burgesses; and that the latter discharged the duties of the office of capital burgesses. It seems to me, upon the whole, that the acceptance of the office of aldermen, although it turned out that the parties who accepted it had no title to it, operated as a surrender of the former office, and therefore that at the moment when they accepted the office of aldermen they ceased to be capital burgesses, and that consequently their votes could not be received as capital burgesses on the election of the defendant. The rule for entering a verdict for the crown must therefore be made absolute.

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Rule absolute.

CHANNON *against* PATCH.

THIS was an action of trespass tried before *Little-*
dale J. at the Summer assizes for the county of
Devon 1825. The jury found a verdict for the plaintiff,

A lessor during the term cut down some oak pollards growing upon the demised

premises, which were unfit for timber: Held, that as tenant for life or years would have been entitled to them, if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them.

de injuria generally to the second, on which issue was joined. It appeared in evidence that *S. W. Buller, Esq.* was now by descent seised of the reversion of the demised premises, and that early in 1824 he had caused all the timber and pollard trees, sound and *unsound*, on the estate to be marked; and that in *May* 1824 he had caused, among others, two pollard oak trees (the trees in question) to be felled which grew on the hedge of a field parcel of the demised premises. The bark was ripped on the day on which they were felled, piled up to dry on the ground where the trees were cut, and, after remaining there a week, carried home to *Mr. Buller's*. The trees remained where they were felled till early in the month of *November* following. About the latter end of *October* they were bought of *Mr. Buller*, with another tree felled in an adjoining field, for 14s. 6d., and paid for by the plaintiff; and afterwards, in *November*, they were removed by the defendant, subsequently to a notice forbidding him so to do, off the demised premises, and carried to an orchard, parcel of another tenement called *Pithayes*, which was then occupied by the defendant under a lease of the same date with that of *Buckwaters*, granted by the same lessor, and to which also *Mr. Buller* was in like manner entitled in reversion. There was no house on *Buckwaters'* farm, but there was one on *Pithayes* used for all the purposes wanted in respect of the occupation of *Buckwaters*, and in which the defendant resided. The demised premises were forty-six acres in the whole, partly arable and partly pasture. After the felling of the two pollard trees in *May*, there were in the whole upon the demised premises 142 oak pollards and seventeen ash pollards, including sound and rotten. The two pollard trees for

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which the action was brought were found by the jury to have been pollards, and decayed, and only fit for fire-wood at the time when, &c., and also at the date of the lease, and to have been unfit for any of the ordinary building uses. Supposing there had been a farm-house on the premises corresponding with the extent of *Barnwaters'* farm, the stock of wood upon it properly applicable to fire-bote was about sufficient for two years' consumption.

Coleridge for the plaintiff. The plaintiff as the vendor of the reversioner was entitled to these trees, for as they were marked, felled, barked, and sold by the reversioner, the property must have been in him unless the defendant had such an absolute and exclusive right to all the trees on the estate fit for fire-bote, as not to make the acts done by the landlord wrongful and actionable, but void, so that they vested no possession in him. But a tenant for years at common law has not any exclusive right to all the wood fit for fire-wood, his right is limited to wood to be consumed on the premises, and he can only take such as is sufficient for that purpose. (a) If that were not so, there would be nothing to prevent a tenant from selling fire-wood, yet that is clearly illegal. *Lord Courtown v. Ward.* (b) The analogy between a tenant's right to estovers and common of estovers is very close. Now a party having common of estovers in the woods of another who cuts down the wood, cannot take part of that which is cut down, but is driven to bring an action, *Basset v. Maynard* (c), *Mary's case* (d), *Douglas*

(a) 2 Bl. Com. 35. Co. Litt. 53 b.

(b) 1 Sch. & Lef. 8.

(c) Cro. Eliz. 820. Fitzh. N. B. 58. 159.

(d) 9 Rep. 112 b.

v. *Kendal* (a), and if the common of estovers appertain to a house, it must be spent in the house, and not abroad, *Valentine v. Penny*. (b) If the landlord, therefore, has the general right, or has only a right concurrent with the tenant, two consequences follow: he may cut so long as he leaves sufficient for the tenant subject to the tenant's right of action for the entry, if it be unlawful. Secondly, even if he cuts to excess, and does not leave enough for the tenant, the property in the trees vests in him or his vendee, and the tenant's remedy is by action. It is not stated in the pleadings that there were not sufficient pollards left for all the purposes of the lessee, and it lay upon the defendant to show that. Nor is it found that a sufficiency was not left, but merely that if there had been a farm house there was about two years' consumption. Supposing an insufficient quantity were left, still the defendant had no right to take the trees when cut, but should have brought an action on the case against the landlord. The latter had at least some right to the pollards on his estate. Although they were decayed and rotten, they still formed part of the inheritance, and did not pass wholly and exclusively to the tenant. The general principle is, that all trees, whether timber or not, are parcel of the inheritance. If demised with the land, the lessee acquires certain rights in them, viz. to the fruits and the shade in one, and in addition to that such rights as the grant of estovers gives in the other. The landlord can cut down neither, still the tree when down is his.

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(a) *Cro. Jac.* 256.(b) *Noy*, 145.

have maintained an action on the case against the landlord for wrongfully cutting them down.

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Judgment for the defendant. (a)

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(a) See *Sadgrove v. Kirby*, 6 t. 2. 483. and 1 Bos. & Pull. 13.

LE HUNTE *against* HOBSON.

ON the hearing of this cause before Lord *Gifford*, the Master of the Rolls, on the 28th day of *April* 1825, his Lordship directed the following case to be stated for the opinion of this Court:

James Le Hunte, formerly of *Artrament* in *Ireland*, being, at the time of making his will hereinafter mentioned, and from thence until the time of his death, seised in fee simple of divers messuages, farms, and lands situate in the county of *Pembroke*, and being of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 20th day of *December* 1779, which was duly executed and attested as by law is required for passing real estates, and he thereby gave and devised as follows, that is to say: "I give and devise my real estate in *Pembrokeshire* to *Daniel Stanford, Esq.* and the Rev. Dr. *Harvey*, and their heirs, until some son of Major *George Le Hunte* shall attain his age of twenty-one years, on special trust, nevertheless that they and their heirs, or the heir of the survivor of them, shall, during that period, out of the issues and profits thereof pay a debt charged to be due by my late uncle *Richard Le Hunte* to one *Hornflower*, a mercer of *Kidderminster*, or his representatives, of 75*l.*, with interest;

Testator, by will duly executed, devised as follows: "On the attainment of the age of twenty-one years of the eldest son of *G. H.*, I give my real estate in *P.* to the said son for life, remainder to his first and every other son in strict settlement, and so on to every son of the said *G. H.*, remainder over." The eldest son attained the age of twenty-one, suffered a recovery to the use of himself in fee, and died, leaving a son, who died an infant and unmarried, and three daughters. The second son of *G. H.* attained the age of twenty-one, and left a son, still living: Held, that this son of the second son of *G. H.* took an estate tail under the will.

on the 21st day of *March* 1813, leaving *Richard Le Hunte*, his only son, and the defendants *Maria Hobson*, *Sophia Le Hunte*, and *Louisa Le Hunte*, all infants, his only daughters, and no other issue, him surviving. The last named *Richard Le Hunte* died in *September* 1821, an infant, without ever having been married, leaving the defendants *Maria Hobson*, *Sophia Le Hunte*, and *Louisa Le Hunte*, his only sisters and coheiresses at law him surviving. The said *W. A. Le Hunte*, the second son of Major *G. Le Hunte*, attained his age of twenty-one years about the year 1791, and he died on the 9th day of *February* 1820, leaving the complainant, his eldest son and heir at law, him surviving.

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Rolfe for the plaintiff. Under the will of *James Le Hunte*, the plaintiff is entitled to an estate tail in the lands in question. The testator, after several preliminary devises, gives the estate to the eldest son of Major *George Le Hunte* for life, remainder to his first and other sons in strict settlement. *Richard*, the eldest son, took under that devise an estate for life only, and the recovery suffered by him was unavailing. It will be said that the remainder to his first and other sons had the effect of giving *Richard* an estate tail, in order to carry into effect the general intent of the testator. But in this case there is no difficulty as to that, and the words, giving the estate to his sons as purchasers, must be construed as words of purchase and not of limitation, unless the latter construction be necessary in order to give effect to the general intent of the testator, *Allanson v. Clithrow*. (a) There is no ambiguity in the meaning of the

(a) 1 Ves. sen. 24.

words,

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words, "in strict settlement," by which the estate given to the sons of *Richard* is described, they mean that the father should take an estate for life, and the first and other sons an estate tail *successive*. (a) But if they were ambiguous those words should be rejected, and then the sons would take an estate for life. It may, however, be argued, that although *Richard Le Hunte* took for life and his sons for life, still, in the limitation over to the second son of *Major Le Hunte*, there are no words of limitation to the children, but it cannot be imagined that the testator did not intend to limit the estate to them in the same manner as to the children of *Richard* the eldest son. The words of the will very fairly admit of such a construction, for after the devise to the eldest son and to his sons, the testator says, *and so on* to every son of *Major Le Hunte*. The words *so on* apply as well to the devise to the grandchildren of *Major Le Hunte*, as to the devise to his younger sons. Besides, the former part of the will shows that the devise is to the eldest son *for the time being* on his attaining the age of twenty-one, now had *Richard* died under twenty-one the second son would have been the first taking under the devise by the description of the eldest son of *Major Le Hunte* for the time being, and then there would have been an express limitation to his children; such a construction must, therefore, be put upon the will, and will give the estate to the children of the second son although his elder brother lived to attain the age of twenty-one, for it cannot be supposed that the testator intended that such a circumstance should make any difference to the children.

(a) See *Roberts v. Kingsby*, 1 Ves. sen. 238.

Tindal contra. *Richard*, the eldest son of Major *Le Hunte*, took an estate tail, and the recovery suffered by him was good; the estate, therefore, is now the property of his three daughters in fee. The words of the devise are, "On the attainment of the age of twenty-one years of the eldest son of Major *G. Le Hunte*, I give the same real estate to the said son for life, remainder to his first and every other son in strict settlement, &c." Now, it is clear that the word *son* may mean *issue*, if that construction is necessary to effectuate the general intention of the testator, *Sonday's* case (a), *Wilde's* case (b), *Whar-ton v. Gresham* (c), *Chorlton v. Craven* (d), *Robinson v. Robinson*. (e) The question then is, whether the testator appears to have had any general object in view which cannot be carried into effect without putting such a construction upon the words of his will. It is clear that the family of Major *George Le Hunte* was the object of the testator's bounty, and that he did not intend the estate to go over until the whole of that family should be extinct. The devise extends not only to the children who were living at the time when the will was made, but to those who might be born afterwards. Now it is a principle of law, that an estate cannot be limited to an unborn son for life, and afterwards to his son; and, therefore, as it is necessary to hold in order to carry the testator's general intention into effect, that every son of Major *Le Hunte* was capable of taking the estate, and as it must be presumed that he intended all the sons to take in the same manner, they must all take, if at all, an

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(a) 9 Co. 127.

(b) 6 Co. 17.

(c) 2 W. Bl. 1083.

(d) Cited by *Preston*, arg. in *Mellish v. Mellish*, 2 B. & C. 524.

(e) 1 Burr. 38.

entitled to an estate tail in the land in *Pembrokeshire* by virtue of the said will.

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against
HORSON.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

JAMES SAUNDERSON, ANN his Wife, and LYDIA
WHITE, Spinster, *against* GRIFFITHS.

DECLARATION stated that by an agreement made between the plaintiffs and the defendant, the plaintiffs agreed to let to the defendant certain premises therein described. The agreement was then set out. Averment that the defendant became and was tenant to the said plaintiffs of the premises upon the terms mentioned in the agreement, and was put into possession; and in consideration of the premises, and that the plaintiffs had then and there undertaken, and promised the defendant to do and perform all things in the said agreement by them to be done and performed, he the defendant undertook and faithfully promised the said plaintiffs that he, during the continuance of his tenancy, would perform the terms and conditions thereinbefore particularly mentioned. Several breaches were assigned for not repairing during the term, underletting without licence, and for not using the farm in a husbandlike manner. Another count stated that in consideration that the defendant received rent from the tenant: Held, that the consideration was not proved as alleged, inasmuch as *A.* was not bound by the agreement before the receipt of rent, and therefore was not a joint contractor *ab initio*. Another count stated, that the defendant was tenant to the plaintiffs, and in consideration had promised to use the lands in a husbandlike manner. The proof was, that he had agreed to farm the land in a husbandlike manner, so be kept constantly in grass: Held, that this also was a variance.

In an action by *A.*, his wife, and *B.*, the declaration stated, that the plaintiffs had agreed to let to the defendant certain lands; that the defendant became tenant to the plaintiffs, and in consideration that the plaintiffs had promised the defendant to perform all things in the agreement by them to be performed, the defendant promised, &c. The agreement given in evidence purported to be made by an agent for the wife of *A.* and *B.* only, but *A.* had subsequently re-

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defendant had become and was tenant to the said plaintiffs of a certain other farm-lands and premises, being the freehold of the said *Ann* and *Lydia*, he the defendant undertook and promised to use the lands in a husband-like manner. At the trial at the Spring assizes 1826, before the justices of the Court of Great Sessions for the county of *Glamorgan*, the plaintiffs proved an agreement for a lease made on the 1st of *February* 1822, between *A. Murray*, agent, on behalf of Miss *White* of *Park Street, London*, and Mrs. *Saunderson* of *Brighton*, of the one part, and the defendant of the other part, whereby the said *A. Murray*, on behalf of Miss *White* and Mrs. *Saunderson*, agreed to let unto the defendant all that part of the grass lands south of *Miskin House*, formerly occupied by *Lewis Williams*, containing about fifty-seven acres, and the defendant agreed to a term for one year from that date, to continue in force from year to year, and to farm the land in a good and husbandlike manner, to be kept constantly in grass, and to bestow all the muck and manure made upon the lands yearly; the defendant also agreed to take the grass occupied by *Thomas Williams* of *Miskin House*, from the 2d of *August* next, at the yearly rent of 57*l.* for the land south of *Miskin Road*, and 35*l.* for the lands occupied by *Thomas Williams* of *Miskin House*, the term to commence the 2d of *February* 1822, for the first parcel, and the 2d day of *August* for the second parcel. There were stipulations by the tenant not to let or underlet without the landlord's licence, to keep in repair all gates, &c. There was a stipulation by the landlord to put the fences and premises into repair as soon as convenient, to allow rough timber for the defendant's repair to be marked and pointed out by the steward, and the parties were to enter

enter into and execute a lease of the above premises ; and this agreement was signed by *A. Murray* and the defendant. *Murray* proved that he demanded the rent from the defendant for Mr. and Mrs. *Saunderson* and Miss *White* ; that he had received the same for Mr. and Mrs. *Saunderson* and Miss *White*, and that he had paid over one moiety to Mrs. *Saunderson*, by the direction of her husband, and the other moiety to Miss *White*. It was objected that there was a variance between the agreement declared on in the first count and that given in evidence, the agreement declared on being described to have been made by the three plaintiffs, and that given in evidence only purporting to have been made on behalf of two ; and that the same objection applied to the other count, for the consideration there stated for the promise was that the defendant had become tenant to the three plaintiffs, whereas he was tenant only to two. The learned Judges were of opinion that the objections were fatal, and the plaintiffs were nonsuited. A rule to set aside the nonsuit was obtained in last *Easter* term, against which

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Malkin and *Whitcombe* now showed cause. The agreement set out in the first count of the declaration is stated to be an agreement made by the three plaintiffs. The agreement proved only purported to be the agreement of two. It was necessary to prove that the agreement was the agreement of the three ab initio, because the promise to perform the stipulations therein contained on the part of the plaintiffs is alleged as the consideration for the promise of the defendant ; and if there was any period during which any one of the plaintiffs was not bound to perform the stipulations, the consideration is
 not

grass is not a qualification of the agreement to use the farm in a husbandlike manner; for the keeping of the land in grass would be according to good husbandry.

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BAYLEY J. I am of opinion that the nonsuit in this case was right. Looking at the form of the first count of the declaration, and the nature of the consideration there stated for the promise made by the defendant, I am of opinion, that in order to support that count, there ought to have been proof of an agreement to which the husband was a party ab initio, and that proof of a subsequent ratification by him of an agreement to which he was originally no party, was not sufficient. There was a contract of demise in writing, and therefore no parol evidence to explain or vary that contract was admissible. The agreement imports to have been made by *Murray*, as the agent of Mrs. *Saunderson* and Miss *White*. Mr. *Saunderson* was a stranger to that agreement, unless his subsequent ratification of it made him a party to it. We have been pressed with the maxim, *omnis ratihabitio retrotrahitur et mandato æquiparatur*; but I think, that when the nature of the contract stated in the first count of the declaration is considered, it is apparent that the subsequent ratification was not equivalent to a previous authority. The contract, at the time when it was made, was intended to give to the landlord and the tenant a right of action against each other for the breach of any of the stipulations entered into by them respectively. Now, suppose within six months after the tenancy had commenced, and before any rent had been paid, the tenant had brought an action upon the agreement against Mr. and Mrs. *Saunderson* and Miss *White* for not repairing, he must have been nonsuited, because he would

farming it in a husbandlike manner, still there may be some cases in which it would not be so. It was therefore a qualification of the previous stipulation, and ought to have been stated in the declaration as part of the description of the contract. Upon the whole, I think that the plaintiffs were not entitled to recover upon any of the counts in this declaration, and that the rule for setting aside the nonsuit must therefore be discharged.

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HOLROYD J. I think that the agreement set out in the first count of the declaration, and there stated to be the consideration for the promise made by the defendant, was not proved, because the agreement proved was not a joint agreement by the husband and wife to demise the land. It was either the agreement of the agent or of the persons for whom he professed to be the agent. Taking it to be the agreement of the other persons from whom he assumed to derive his authority, it was then only the agreement of two persons, and was not, in point of law, the agreement of the husband. It was said, however, that he at a subsequent time assented to that agreement, and that such subsequent assent made it his agreement ab initio. There might have been some weight in that argument, if the agent at the time when he made the agreement had professed to have authority to act for the husband, because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here the husband never previously authorized the agent to make the agreement on his behalf, nor is he named as a party for whom the latter professed to act. The subsequent receipt of rent by the husband, cannot make him a joint contractor ab initio

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with the persons for whom the agent had authority to act. It could amount only to an acknowledgment that the defendant was his tenant, and it might have effect of binding the husband so far as to prevent from turning the tenant out of possession. The fourth section of the statute of frauds enacts, "that no action shall be brought upon any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party charged therewith, or some other person thereunto by him lawfully authorized." Now I think that there was no note in writing in this case to show that this was the contract of the husband, and supposing this amounted to an agreement to demise in future, it would still be an agreement concerning land, and would, as it seems to me, fall within the fourth section of the statute of frauds; but whether that be so or not, I think there was in this case no proof of a joint contract by the husband and wife, and that the mere acceptance of rent by the husband would not make that his contract, which on the face of it did not import to have been made in his behalf. I also think that the other count was not supported by proof, because there was not any unequal stipulation to use the land in a husbandlike manner, so to use it keeping it in grass. The rule for setting aside the nonsuit must therefore be discharged.

Rule discharged.

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Earl of SEFTON and Another *against* COURT.

THIS was a feigned issue tried under the provisions of an act of parliament passed in 1822, for inclosing a certain common or tract of waste land, called *Burlish Common*, in the manor and chapelry of *Lower Mitton*, in the parish of *Kidderminster*, in the county of *Worcester*. The plaintiffs by their declaration alleged, that they were entitled to rights of common in the waste lands of the manor of *Mitton* for sheep in respect of their freehold lands, in the parish and manor of *Kidderminster*, viz. 115 acres of land in the occupation of *W. Jones*, called *Burlish Farm*, otherwise *Birchin Coppice Farm*, and 144 acres of land in the occupation of *W. Hornblower*, called *Blackstone Farm*. This was denied by the plea. At the trial before *Garrow B.*, at the Spring assizes for the county of *Worcester* 1826, the following appeared to be the facts of the case. Prior to 1817 Lord *Foley* was seised in fee of the two farms mentioned in the declaration, and by indentures of lease and release, he, in *May* 1817, conveyed the whole of his estates to the plaintiffs in trust to pay certain incumbrances. The defendant was the commissioner named under the inclosure act. *Blackstone Farm* consisted of 144 acres; 40 acres of these, before the year 1774, were common or waste land, and part of *Kidderminster Common* and 104 acres were old inclosures. *Burlish* or *Birchin Coppice Farm* consisted of 115 acres; of these, 62 acres, before 1795, were wood land, and were called *Burlish Wood* or *Birchin Coppice*; and 53 acres, before the year 1774, were common or

The lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor.

waste and common lands in the manor of *Mitton*, and that no such right could have been acquired subsequently to that period, inasmuch as the lords of that manor were incapable of making a grant. It was contended further, that even if such a right could exist in point of law, the evidence was not sufficient to show that it existed in fact, because the exercise of the right might be referred to those lands, which, before 1774, were inclosed. The learned Judge directed the jury to find a general verdict for the plaintiff, but reserved liberty to the defendants to move to confine the verdict to such part of the land as consisted of the old inclosures prior to the year 1774, and to enter a verdict for the defendant as to all the rest of the *Blackstone Farm*, and also, as to the whole of the *Burlish Farm*, otherwise *Birchin Coppice Farm*. A rule nisi having been obtained for that purpose,

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Campbell and *O. W. Russell* now showed cause. The jury having found that a right of common belonged to the plaintiffs in respect of the lands which were inclosed since the year 1774, as well as those inclosed before that time, the first question is, whether such a right could by law exist in respect of lands which, before 1774, were waste lands, subject to rights of common. As to that question, if there can be a legal origin of the exercise of such a right, it ought to be presumed, for it ought not to be taken for granted, that for nearly fifty years the tenants of these farms have been guilty of a series of trespasses. Before 1774 *Mr. Foley* was seised in fee of the old inclosed part of *Blackstone Farm*, and he was also seised in fee of the soil in the uninclosed waste as lord of the manor, and when he turned his own cattle on the waste of his own

The objection is, that the plaintiffs are not entitled to a right of common in respect of those lands which were formerly part of *Kidderminster Common*, and were allotted to Lord *Foley's* ancestor under the inclosure act. It is said, first, that in point of law no such right could exist in respect of uninclosed waste lands, on which there were rights of common; and, secondly, that in point of fact no such right did exist. I think, that in point of law, the lord of a manor may, in respect of his right of soil in the waste commonable lands of his manor, have a right to turn his own cattle on the waste or common lands of another manor. The lord is seised in fee of the waste; and although he may before the time of legal memory have granted to others a right of common on that waste, yet he may also, before he made any such grant, have had granted to him the privilege of turning his own cattle on the waste of an adjoining manor. I think, therefore, that in point of law the lord of this manor may have had a right of common in respect of those lands, which before the year 1774 were subject to right of common. But I have great difficulty in saying that there was any evidence to show that in fact such a right existed. If the lord besides the newly inclosed lands, had no other lands in respect of which he claimed to have a right of turning his sheep upon *Burlish Common*, the fact of his having turned on even since 1774 would have been evidence of his having a right in respect of those newly inclosed lands; but that would be a very different case from the present, for here the lord claims to have a right in respect of other lands, as well as the newly inclosed lands. There was no evidence that any person before the inclosure had ever turned on in respect of the allotments, and in the absence of all evidence, it ought not to have been presumed

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JOHN WYNNE *against* GRIFFITH. (a)

THE following case was sent by the Master of the Rolls for the opinion of this Court :

By indentures of lease and release, bearing date respectively the 1st and 2d days of *June* 1750, the release being made between *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, spinster, daughter and heir apparent of the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, widow, of the first part; *John Salusbury* and *John Ellis* of the second part; and *Robert Wynne* and *Owen Holland* of the third part; and by a common recovery suffered in pursuance thereof on the 8th of *September* 1750, certain lands, the estate and inheritance of the said *Humphrey Roberts*, and certain other lands, the inheritance of the said *Catherine Roberts*, and certain other lands therein described to have been theretofore purchased by the said *Humphrey Roberts*, and all other the messuages, lands, tenements, and hereditaments whatsoever of them the said *Humphrey Roberts*, *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, or any of them, in the parishes therein mentioned, and elsewhere in the county of *Carnarvon*, with their appurtenances, were limited to the use and behoof of such person and persons and for such estate and estates, and subject to such provisoes, limitations, trusts, conditions, and agree-

C. and *H. R.* seized in fee of certain estates by lease and release of the 1st and 2d *June* 1750, and a common recovery, settled them to such uses as *C.*, *H. R.*, and *D.* his wife, and *M. R.* should, by deed executed in the presence of two witnesses, appoint, and in default of appointment, as to part to the use of *C.* for life, and subject to *C.*'s life estate as to that part; and as to the whole of the residue, in default of appointment, to the use of *H. R.* in fee. By indenture of the 2d *October* 1751 (the execution of which by the parties of the second part was attested by three witnesses) between certain persons therein named of the

first part; *C.*, *H. R.*, and *D.* his wife, and *M. R.* of the second part, and *W. M.*, *J. L.*, *R. W.*, and *P. W.* of the third part; *C.*, *H. R.*, and *D.* his wife, and *M. R.* did grant, bargain, sell, release, confirm, direct, limit, and appoint unto *W. M.*, *J. L.*, *R. W.*, and *P. W.* (in their actual possession, being by virtue of a lease for a year to them by the said *C.*, *H. R.*, and *D.* his wife, and *M. R.*) the estates before mentioned, habendum to them *W. M.*, *J. L.*, *R. W.*, and *P. W.* in fee, to the several uses thereafter mentioned: Held, that under these deeds the legal fee in the premises so settled did not vest in *W. M.*, *J. L.*, *R. W.*, and *P. W.*

(a) *S. C.* 3 *Bing.* 179.

ments,

By indentures, bearing date respectively the 1st and 2d of *October* 1751, the former being a lease for a year, and made between *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, of the one part, and *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne* of the other part; and the latter being of three parts, and made between *Robert Wynne* the elder and *Robert Wynne* the younger, son and heir apparent of the said *Robert Wynne* the elder, of the first part; *Humphrey Roberts* and *Dorothy* his wife, and *Mary Roberts* and *Catherine Roberts*, of the second part; and the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*, of the third part; after settling divers lands belonging to the said *Robert Wynne* the elder and *Robert Wynne* the younger to the uses therein mentioned, it was witnessed, that in consideration of the marriage then intended to be had and solemnized between the said *Robert Wynne* the younger and the said *Mary Roberts*, and of the provision thereinbefore made for her and her issue, and for the settling of the messuages, tenements, lands, hereditaments, and premises thereafter mentioned, to the uses therein expressed concerning the same, the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, did grant, bargain, sell, release and confirm, direct, limit, and appoint unto the said *William Mostyn*, *John Lloyd*, *Robert Wynne* of *Garthwin*, and *Pierce Wynne*, in their actual possession being by virtue of the said lease for a year made to them by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, as therein mentioned, certain lands therein particularly described (which included the lands comprised in the said indentures of the 1st and 2d of *June* 1750, and

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of waste ; and as to the several premises so limited to the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, for their lives respectively, from and after the respective determination of the several estates so granted to them, to the use of *W. Mostyn*, *J. Lloyd*, *Robert Wynne* of *Garthwin*, and *Pierce Wynne*, and their *heirs*, for and during the term of the lives of *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts* respectively, in trust only to preserve the contingent uses and estates thereafter limited. And as to as well the premises so limited to and to the use of *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts* respectively, for their lives as aforesaid, from and after their several deceases respectively, and as the said estates should end and respectively determine, as also as to the rest and residue of the premises thereinbefore mentioned, and whereof no use was thereinbefore limited or declared, to the use of *Robert Wynne* the younger and *Mary* his intended wife, for their lives, and the life of the longest liver of them, without impeachment of waste ; and from and after the determination of that estate, to the use of the trustees and their *heirs* during the lives of the said *Robert Wynne* the younger and *Mary* his intended wife respectively, in trust to preserve contingent remainders ; and from and immediately after the decease of the survivor of them, *Robert Wynne* the younger and *Mary* his intended wife, to the use of the same trustees, their *executors*, *administrators*, and *assigns*, for the term of 500 years, upon trusts to raise portions for younger children ; remainder to the use of the first and other sons of the marriage successively in tail, remainder to the use of the daughters of the marriage in tail, remainder to the use of *Humphrey Roberts* in fee.

By the said indenture of the 2d of October 1751, the said *Humphrey Roberts* (for himself and *Dorothy* his wife)

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by a decretal order of the Court of Chancery made on the 5th of *August* 1822, in a cause in which the said *John Wynne* was plaintiff, and the said *John Wynne Griffith* and others were defendants, it was declared that the said portion of 6000*l.* had been fully paid and satisfied, and that the said term of 500 years had ceased and determined. *Robert Watkin Wynne* died in the lifetime of his mother *Mary Wynne* without having barred the entail, leaving *John Wynne*, his eldest son and heir at law, him surviving. *Mary Wynne* died in *January* 1814. Shortly afterwards *John Wynne* suffered a common recovery to the use of himself in fee.

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The question was, whether, under the said indentures of the 1st and 2d of *June* 1750, and the common recovery suffered in pursuance thereof, and under the said indentures of the 1st and 2d of *October* 1751, the legal fee of such of the estates and premises comprized in the first mentioned indentures as were settled and assured by the last mentioned indentures became vested in the said *W. Mostyn*, *J. Lloyd*, *Robert Wynne* of *Garthwin*, and *Pierce Wynne*? And if so, whether a jury would be directed to presume a reconveyance of the said legal estate to the uses specified in that deed?

Preston for the plaintiff. The conveyance in fee of the first and second of *October* 1751, operated as a conveyance by virtue of the seisin of *Humphrey Roberts* and *Catherine Roberts*, and not as an appointment by virtue of the power. It is important to ascertain the exact relative situation of the parties before the deeds of 1751. The deed of 1750 contains several powers of appointment. The only estate limited by that deed was an estate for life as to that part of the property vested in *Catherine Roberts*, and the fee simple subject to that

A. being tenant for life, remainder to *B.* in fee, they by deed indented, joined in a lease to the plaintiff; it was resolved, that presently by the delivery of the deed, it was the lease of *A.* during his life, and the confirmation of *B.*; and after the death of *A.* it was the lease of *B.*, and the confirmation of *A.* *Roe v. Tramarr* (a) is a strong authority to the same effect. There a deed which could not operate as a release because it attempted to convey a freehold in futuro, was held to operate as a covenant to stand seised. Another rule of law is, that where a deed may enure in different ways, the person to whom it is made shall have his election in which way to take it, *Hcyward's case* (b), *Darrel v. Gunter*. (c) He may in pleading ascribe to it that operation which will best suit his interest. Thus, if an instrument will operate either as a grant or as a bargain and sale, the party to whom it is made may ascribe to it that operation which will best answer his purpose. This being the state of the law, it becomes necessary to consider the form of the instrument. There are cases where an instrument may operate as an appointment as to part, and as a conveyance as to the residue, because it may happen that a party who had a partial ownership had not a power adequate for the purpose of passing the whole interest. In this case the deed must operate as an appointment or a conveyance as to the whole. It could not be pleaded as an appointment and also as a conveyance. The party would be bound to plead it in one or the other form, and by his mode of pleading would declare his election to treat it either as an appointment or a conveyance. Even if the grantors had professed

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(a) *Willis*, 692. 2 *Wils.* 75.(b) 2 *Rep.* 35.(c) *Sir W. Jones*, 306. 3 *Roll. Ab.* 787. pl. 7.

the trustees? The only act they and their heirs were to do for the purposes of the settlement, was to preserve contingent remainders, but they would be as well preserved by law as by any act of the parties. The great duty which they have to perform is that which relates to the term of years, which of course was regularly and properly limited to them and their executors. The executors and not the heirs of the trustees were to be the trustees to perform those duties; and then if a trustee died, this consequence would follow; that it would be necessary to bring his heirs, in respect of the legal fee, and also his executors, into a court of equity, for the purpose of raising the terms. From all these considerations it is evident, that the true construction to be given to this instrument is that which will enable a court of law to carry it into effect without the aid of a court of equity; and for that purpose it ought to be construed as a conveyance to uses, to be executed by the statute. If this case had occurred before the statute of uses, the Court would have considered the power as subordinate to the seisin. It is a rule of law, that where an instrument may operate in two modes, either as a release at common law or under the statute of uses, it should be considered to operate rather as a release at common law than under the statute, unless there is some reason for its operating under the statute. For an instrument prepared the day before the statute passed would otherwise have one operation, while another prepared the day following would have a different effect. Supposing this estate had been sold to a builder, under a conveyance to uses, in the same form as in the present case, and that there had been reserved a rent charge, by making the first use to the intent that the vendor and his heirs

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Andrews v. Emmett (a), *Colet v. The Bishop of Coventry*. (b) That rule was founded on Sir E. Clere's case, in which, according to the second resolution, the act was ruled to take effect out of the interest, although by that construction a will was rendered void as to one-third. And, according to the case of *Cox v. Chamberlain* (c), which is very similar to the present, the instrument is to be considered either as an appointment or a release, as will best effect the intention of the parties: There, a man having a general power of appointment, with a limitation in default of appointment to himself in fee, by lease and release, in pursuance of all powers in him vested, did grant, bargain, sell, alien, remise, release and confirm, limit, declare and appoint, the estate to trustees to uses. If the deed operated as a conveyance of his interest, then the title was good; but if it operated as an appointment, the legal estate vested in the trustees; the intended uses were mere trust estates, and the title was, under the circumstances, bad. Lord *Alvanley* held, that the instrument operated as a conveyance of the interest. That case is consistent with all the other decisions which preceded or followed it. *Goodill v. Brigham* (d) may, on the first view, appear to be at variance with it. In that case there was a devise in fee to a feme covert with a power to dispose of the estate without the controul of her husband, and it was held that such a power was void, as being inconsistent with the fee given to her in the first instance. That case proceeded on a rule of the common law, by which a fee and a power cannot exist in the same person. That rule does not apply to a case under the statute of

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(a) 2 Bro. Cha. Ca. 300.

(b) *Hob.* 159.

(c) 4 Ves. jun. 631.

(d) 1 Bos. & Pul. 192.

and those of conveyance are rejected, then this Court, which is a Court of law, cannot take notice of uses and trusts, and the deed can only be construed by the rules of law. It is a rule of law, that when two parts of a deed are inconsistent with each other, the first part is to be retained and the latter rejected. According to the construction contended for, the Court must reject all the words of grant, all the words of uses, and so make one half of the deed wholly inoperative. But assuming that the estate was vested in the trustees, a reconveyance from them ought, after so great a lapse of time, to be presumed. [*Bayley J.* Such a presumption ought not to be made by this Court in a case sent to them from the Court of Chancery. It is a presumption of fact which is to be made by a jury, and not a presumption of law which is to be made by the Court. Upon proof of the facts stated in this case, a judge would not *direct* a jury to presume a reconveyance, but would leave it to them to make such presumption or not, as they thought proper. It is a conclusion to be drawn by the jury from the circumstances of the case.]

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Coote contra. It may be conceded, that if this instrument is to be considered as a conveyance by *H. Roberts* and *C. Roberts*, it will operate as an extinguishment of the power, because, after *H. Roberts* had conveyed his interest, it would have been impossible for him to concur in exercising the power of appointment, so as to defeat that which he had already done. It may be conceded also, that where the objection to a deed is, that it cannot operate in a particular mode, the party claiming under it may plead it as operating in some other way to support his interest. But this is not a

case

vis. by way of appointment, because it clearly appeared, from the instrument itself, that the parties intended that it should operate in that mode. If that be the principle upon which the question in this case is to be decided, there is no difficulty in it, because it appears evident from the instrument itself, that the parties intended it should operate as an appointment, in execution of their power. If they had intended that it should operate as a conveyance of their interest, it would have been unnecessary for any other persons than *C. Roberts* and *H. Roberts* to have been parties to the deed; but it is executed by four, and one of them, *Mary Roberts*, had no legal or equitable estate in the property. If *C. Roberts* and *H. Roberts* are considered the only conveying parties, the acts of *D. Roberts* and *M. Roberts* will be nullified, and their names may be considered as struck out of the deed. [*Holroyd J.* May it not operate as a confirmation by them?] *M. Roberts* had no estate either in possession or reversion in the property, and *D. Roberts* was a married woman. With what intent, therefore, could *Mary Roberts* execute the bargain and sale for a year? It is true, that where the same person has an interest and a power, and the deed may operate either as a conveyance in respect of the interest, or as an appointment in execution of the power, it shall refer to the interest and not to the power; but that rule does not apply to a case like this, where four persons had the power and one only the fee, and the four have executed the instrument. A reasonable construction must be put upon the act done by the four, and that act could only have been done with reference to the power. The case of *Roach v. Wadham* was not so strong a case as the present; it was an action against the

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it been the intention of the parties that the estate which *Wadham* was to take should be derived out of the interest which *Watts* had, it would have been wholly unnecessary that *Coates* should have been a party to the deed." Although this reasoning has been much objected to, yet the meaning of the Court must have been, that if it can be once ascertained that a person has been made a party to a deed who would not have been, a necessary party if it was intended only to operate as a conveyance, that then it should not be considered to have been the intention of the parties that it should operate as a conveyance, but as an appointment. Now apply that to the present case. If it had been the intention of the parties that the estate was to be derived out of the interest which *H. Roberts* had, it would have been wholly unnecessary that *Mary Roberts* should have been a party to the deed. The circumstance of her having been made a party to this instrument makes it manifest that the intention was that it should operate as an appointment in execution of the power, and effect must be given to that intention so expressly declared upon the face of the instrument, although it may not be consistent with some of the subsequent provisions in the deed. In *Cox v. Chamberlain* (a) Lord *Alvanley* says, "that upon every principle upon which the Court acts with regard to the construction of conveyances, it would be monstrous to hold, that where there is a power and an interest, and *the act being equivocal*, it is doubtful whether he acted under the one or the other, the Court should adopt that which would defeat the instrument." If in that case the act

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(a) 4 Ves. jun. 631.

had

in this case any intention expressly declared as to the mode in which it is to operate, and that in order to ascertain that intention the Court must look to the ultimate objects of the deed, it will even in that view of the case sufficiently appear that the deed in this case must have been intended to operate as an appointment, and not as a conveyance. By the deed of 1750, *H. Roberts* was seised in fee, subject to the powers of appointment. If, therefore, the parties had not exercised their power, and *H. Roberts* had died in seisin of the estate, leaving his wife surviving, she might have claimed her dower, for she had clearly an inchoate right of dower under the deed of 1750. Now the only way in which these parties could make a valid conveyance of the property comprised in the deed of 1750, so as to bind the interest of all the parties, was either by exercising the power or by levying a fine by *H. Roberts* and *Dorothy* his wife. If they resorted to neither of these modes of conveyance, their settlement would have been imperfect; so that if *D. Roberts* had survived her husband, she might have claimed her dower. Now, supposing *Dorothy* to have survived her husband, and to have claimed her dower, would it have been permitted to her (she having concurred in the deed of 1751), to say that she did not intend to exercise her power, but that that deed was intended by *C. Roberts* and *H. Roberts* as a conveyance out of their seisin? The answer to that would have been, that the only way in which the deed could operate as a perfect settlement was by considering it an exercise of the power, that she had concurred in the deed of conveyance, and it must, therefore, be taken most strongly against her; and that she being a married woman, and not having levied a fine,

it

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that it would be a conveyance by those who have the seisin, in order to give effect to the uses, and an appointment by way of extinguishment of dower. Suppose the widow was claiming her dower at law, and that the defendant pleaded several pleas, showing the creation of the power, the conveyance under the seisin, and stating that by virtue of the power he appointed, and thereby discharged the dower. Supposing she alone had the power, then in one clause the husband could have conveyed to releasees to uses, and in another the wife might have stated her intention to exercise her power; and that for the purpose of extinguishing her dower, she directed, limited, and appointed, &c.; that would not be a formal release, but it would take effect as such by operation of law. In order to give effect to the intention of the parties, it must be construed to be her confirmation and her release through the operation of the words *direct, limit, and appoint*; and in that case the whole fee would have passed. Suppose a person had an estate for life, with a power over the fee, and had used the words found in this case, it might have been pleaded as a grant as to the life estate, and as an appointment of the fee. So in this case *D. Roberts* discharged her dower by the appointment, and the party availing himself of the appointment would have had himself the whole fee. [*Bayley J.* The case that you have put supposes that she alone had the power. Here the joint appointment is by the four — one could do nothing. What would have been the effect of a deed framed in this way? Suppose the four to have joined in a bargain and sale for a year, and then in a release in the ordinary words, and after completing the uses, it continued thus, — and for the purpose of barring the dower of the said *Dorothy*

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Roberts, the said four did, under and by virtue of the power given to them by the deed of 1750, appoint.] That is precisely the present case. In the first place, there is a conveyance and then an appointment operating by way of release in extinguishment of her dower. [Bayley J. But before the appointment comes into operation the whole is conveyed by the previous part of the deed.] The case is not to be decided by the strict rules of the common law; it depends upon the statute of uses, and effect must be given to the intention of the parties. It is clear that *Catherine Roberts* could have given the whole legal fee by concurring with the other three persons who had the power jointly with her; and if the power had been so executed, what would have been the consequence in a court of equity before the statute of uses? For her act will have the same operation and effect since the statute as it would have had in a court of equity the very day before the statute passed. Now if this question had arisen in a court of equity before that statute passed, and the parties had done exactly that which they have done in this case, viz. attempted to convey all they had in order to give a good legal estate, that would have been held to operate as an appointment by the four, and *Catherine*, who had an interest, having attempted to extinguish the power, would not afterwards have been permitted to say in a court of equity that she had any interest in possession in opposition to her act exercising the power. In *Boughton v. Sandilands* (a) there was not any concurrence of the husband as a conveying party; for there *Eliza Boughton*, with the privity and consent of *G. C. B. Boughton*,

(a) 3 Tamm. 512.

ton, directed and appointed, and with the same privy and consent granted and confirmed, &c. But the husband and wife did not exercise the power as a joint power of appointment. It would be inconsistent with all the authorities to hold the instrument in this case to operate on the fee as an appointment. It is sufficient if it can so operate for a partial and useful purpose, so as to put an end to all those interests which would not have passed by a conveyance of the fee. [*Bayley J.* Might not an operation be given to every one of the words, by supposing *Catherine Roberts* and *Humphrey Roberts* to grant, bargain, and release to the releasees all the property, and then the four who have the power, to direct, limit, and appoint, to the uses thereafter mentioned? The deed does not profess to grant to the use of the releasees. There is not any single use declared in their favour.] By so reading the deed, effect will be given to every word, and the intention of the parties will be carried into execution. It is suggested, in a note to *Co. Litt.* 271 b., that although it is very informal to blend together the language of the appointment and the release, yet the words may be marshalled by construction so as to give them all their intended effect.

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The following certificate was afterwards sent.

“ This case has been argued before us by counsel, and we are of opinion, that, under the said indentures of the 1st and 2d days of *June* 1750, and the common recovery suffered in pursuance thereof, and under the said indentures of the 1st and 2d *October* 1751, the legal fee of such of the estates and premises comprised in the said first-mentioned indentures, as were settled and as-
 sured

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sured by the said last-mentioned indentures, d
vest in the said *William Mostyn, John Lloyd,*
Wynne (of Garthwin) and Pierce Wynne."

J. BAYLEY.

G. S. HOLRO

J. LITTLEDA

(a) This case was argued on the 11th of *January* 1826, and th
ficate was sent on the 28th of *January*.

END OF TRINITY TERM.

AN
I N D E X
TO THE
PRINCIPAL MATTERS.

ACTION ON THE CASE.

See MARKET.

The lessee, by deed poll, assigned his interest in the demised premises to *A.*, subject to the payment of the rent and the performance of the covenants contained in the lease. *A.* took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that *A.* continued assignee of the premises, and recovered damages against the lessee: Held, that the lessee might maintain an action upon the case founded in tort against *A.* for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. *Burnett and Others, Executors, v. Lynch, T. 7 G. 4.* Page 589

ALIEN.

Children born in the United States of *America* since the recognition of their independence, of parents
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who resided there before, but who were natural born *British* subjects, and at the time of the separation of the two countries adhered to the *British* government, are not aliens, and are capable of inheriting lands in this country. *Doe on the demises of Auchmuty and Others v. Mulcaster and Others, T. 7 G. 4.* Page 771

ANNUITY.

Warrant of attorney and judgment for securing an annuity set aside because the initials only of the Christian names of the witnesses were inserted in the memorial. *Metcalf v. Bowes, H. 6 & 7 G. 4.* 258

APPEAL.

1. In a notice of appeal against an order of two justices for stopping or diverting a public footway, it is necessary to state that the party intending to appeal is injured or aggrieved by the order. *The King v. The Justices of Essex, E. 7 G. 4.* 431
2. Upon an appeal against an order for the allowance of overseers' accounts,
3 Q

counts, a magistrate, a rated inhabitant of the parish, cannot vote either on the determination of the appeal, or on a question as to granting a case for the opinion of this Court. *The King v. Gudridge and Others*, E. 7 G. 4. Page 459

APPOINTMENT.

See DEED, 7. DEVISE, 2.

ARBITRAMENT.

1. Where an award is void, and nothing can be done upon it without suit, the Court will not interfere to set it aside, because such suit must fail. But where a cause is referred by order of N. P. and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered; although such award be void, the Court will set it aside, for otherwise the party in whose favour the award is made will have judgment upon the verdict without any new proceeding to enforce the award. *Doe dem. Turnbull and Others v. Brown*, E. 7 G. 4. 384
2. Where a cause is referred by a Judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a Judge's order, on moving for an attachment for not performing the award, it must be shown that the order enlarging the time was made by consent. *Halden v. Glasscock*, E. 7 G. 4. 390
3. Where a cause and all matters in difference were referred by order of Nisi Prius, and the arbitrator by his award found "that nothing is due to the plaintiff:" Held, that this must be considered as a finding, that the plaintiff had no right to recover in the action.

The arbitrator had power to enlarge the time for making his award by indorsement on the or-

der of reference; that order, together with two indorsements enlarging the time, was made a rule of Court: Held, that on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.

By the order of reference, costs were to abide the event; there were two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The Master taxed the whole costs of the cause, and the reference in one sum to the other defendant, by whom payment was demanded of the plaintiff. The Court refused to grant an attachment for non-payment of those costs. *Quære*, whether the Master had power to tax costs for the two defendants separately? *Dickins v. Jarvis and Smith*, E. 7 G. 4. Page 528

4. Debt on bond conditioned for the performance of an award to be made on a day therein named. One of the terms of the submission was, that the arbitrator should examine the witnesses produced by the parties in difference. Plea, that the arbitrator made several appointments for proceeding with the reference, and examined witnesses produced by the plaintiffs, and occupied the whole of the time of the meetings respectively in so doing; that plaintiffs, on the day when the time for making the award expired, closed their case, and defendant was called upon to enter upon his defence; that at that time an insufficient time remained for the defendant to bring forward and examine his witnesses; that he requested the arbitrator to allow him reasonable time to bring forward and examine his witnesses, which the arbitrator refused, without the consent of the

plaintiffs

- plaintiffs, and which consent the plaintiffs, although requested by the defendant, refused to grant, and the arbitrator refused to allow the defendant any further time, although he had several material witnesses to examine, of which the arbitrator and the plaintiffs had notice: Held, upon general demurrer, that this plea was bad. *Grazebrook v. Davis*, E. 7 G. 4. Page 534
5. Where an award under the 9 & 10 W. 3. c. 15. was made after the essoign day, but before the quarto die post: Held, that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term next following. *In the matter of Burt*, T. 7 G. 4. 668

ASSIGNMENT.

- A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the licence of the lessor. The lessee in *January* 1825, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In *April* 1825, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of *January* 1825 was an act of bankruptcy and void; that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture. *Doe dem. Lloyd v. Powell and Others, Assignees*, H. 6 & 7 G. 4. 308
3. Where a contract was made between *A.* and *B.*, whereby *A.*, having a quantity of apples, agreed to sell his cyder to *B.* at a certain price per hogshead, to be delivered at *T.* at a future time, and to lend such pipes as he had for the use of the cyder, to be manufactured on his (*A.*'s) premises, and to be paid for before it was removed, and *A.*, in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by *B.* to manufacture the cyder on *A.*'s premises, and before the cyder was completely manufactured, it was seized by the excise-officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as *B.*'s property, together with the casks, and in assumpsit for goods sold and delivered, brought by *A.* against *B.*, it appeared that the word *cyder*, at the place where the contract was made, meant the juice of the apples as soon as it was expressed, it was thereupon held, that the

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ASSUMPSIT.

1. A bailiff employed by an attorney to execute writs may maintain an action of assumpsit against him for the fees usually paid on such occasions. *Foster v. Blakelock, Executor*, E. 7 G. 4. 328
- 3 Q 2 contract

contract must be construed to have been for the sale of cyder in that sense of the word, and that the property passed to *B.* as soon as the apple juice was delivered to his servant. Secondly, that it was *B.*'s duty to enter the premises, and as through his default it became impossible for *A.* to deliver the goods at *T.*, the failure to do so did not bar his action. Thirdly, that *A.* might recover in this action the price of the casks lent to the defendant. *Studdy v. Sanders and Another*, *T.* 7 G. 4. Page 628

4. A pauper, being casually in the parish of *A.*, met with an accident which disabled her, and which required immediate medical assistance. The constable of that parish improperly removed her to her own (which was the adjoining) parish, and sent for the surgeon of that parish to attend her: Held, that it was the duty of the parish officers of *A.* to have taken the pauper to the nearest convenient house in *A.*, and to have provided medical attendance there, and that they could not, by improperly removing the pauper to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them, and that they were therefore liable to pay the surgeon's bill. *Tomlinson v. Bentall*, *T.* 7 G. 4. 738

ATTORNEY.

See ASSUMPSIT, 1. EVIDENCE, 2.

1. An attorney entered into a written contract, whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted; no time was expressly fixed for the commencement of the partnership: Held, that no time being expressly appointed, the partnership commenced from the date of the agreement; that

parol evidence was proper admitted to show that the taken into partnership was an attorney at the time when the agreement was executed; but it could not be received to show that the agreement was not to take effect until he should be admitted, for that would make the agreement different from which it purported to be, viz. an agreement for a present partnership. *Williams v. Jones*, *H.* 7 G. 4. Page

2. Where an attorney's bill is produced on taxation by a sixth party, the client is entitled to the benefit of taxation. They are not to be taken into consideration at the discretion of the Court. *Hill v. Woolcott*, *T.* 7 G. 4.

BANKERS.

See FORGED CHECK.

BANKRUPT.

1. Where a commission of bankruptcy is issued against a person the custody of the suit of the petitioning creditor, and who afterwards applied to the Court of K. B. to obtain his discharge under 49 G. 3. c. 121. s. 14, on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission: Held, that he could not in an action against the assignee dispute the validity of the commission. *Watson v. Wace* and *Others*, *H.* 6 & 7 G. 4.
2. A lease contained a proviso for re-entry of the lessor, and the lease should be void on the lessee's assigning without the licence of the lessor. The lessee, in January 1825, executed a deed which purported to convey all his real and personal property to trust for the benefit of his credit

In *April* 1825, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of *January* 1825 was an act of bankruptcy and void; that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture. *Doe dem. Lloyd v. Powell and Others, Assignees*, 11. 6 & 7 G. 4. Page 308

3. In *December* 1811, G., then abroad, being indebted in the sum of 1000*l.* to the estate of W., a bankrupt, the assignees of W. issued against him writs of special *capias alias* and *pluries*, in *Michaelmas* term 1812, and *Hilary* term 1813, which were delivered to the sheriffs of *London*, and by them duly indorsed *non est invent.*, but the writs remained in the sheriff's office. In 1814, G. being on board a ship in the *Downs* waiting for a fair wind, went several times to *Deal*, but W.'s assignees had not notice of his being there. In 1819 G. returned to reside in *England*. In 1821, the debt of 1000*l.* being still unpaid, the assignees of W. struck a docket against G., and upon their petition a commission issued against him, and on the 21st *March* in that year he was declared a bankrupt. G. petitioned to have the commission superseded, and by an order of the Vice-Chancellor, made *May* 1821, it was ordered that G. should be at liberty to bring trover against his assignees to try the validity of the commission; which action he accordingly commenced 19th *May* 1821. Two days afterwards the attorney for the petitioning creditors took away the writs of special *capias alias* and *pluries* from the sheriff's office; and on the 11th of *July* 1821, the last day of *Trinity* term, a roll of the proceedings, with the continuances

on the writ of *pluries* brought down to the term next preceding the date of the commission issued against G., was docketed and carried in, and on the same day the three writs were filed of record. Upon a case stating these facts: Held, that the assignees of W. had not, at the time of suing out the commission awarded and issued against G., or on the 21st *March* 1821, when he was declared a bankrupt, a valid debt as petitioning creditors to support the commission. *Gregory v. Hurrill, E.* 7 G. 4. Page 341

4. Where a promissory note, payable with interest twelve months after notice, was expressed to be "for value received," and the maker became bankrupt before any notice was given: Held, that the payee might prove it under the commission. *Clayton v. Gosling, E.* 7 G. 4. 360

5. The Court will not set aside an execution issued upon a judgment obtained by default, confession, or *nil dicit*, and served and levied by seizure upon the property of a bankrupt before his bankruptcy, the statute 6 G. 4. c. 16. s. 108. not rendering the execution in such case void, but merely enacting that the plaintiff in such execution shall share rateably with the other creditors. *Taylor v. Taylor, E.* 7 G. 4. 392

6. Where by statute it was enacted, "that in case any treasurer, collector, officer, or other person appointed by the commissioners having the control of the pavements of any places mentioned in the act, for the collection and receipt of monies, to be collected and received by virtue of any rates and assessments, &c., shall happen to become bankrupt before he shall have fully paid and satisfied all monies received by him or them for or in respect of any such

rates or assessments, or for or on account of the commissioners, &c., the assignees shall pay in full all the money due to such commissioners (if the bankrupt's estate be sufficient), in preference to all debts, except those due to the king: Held, that bankers employed by the commissioners without any actual appointment, were within the words "other persons" used in this section, as being in the nature of treasurers, and that inasmuch as the statute did not require the appointment of treasurers, collectors, &c. to be in writing, the employment was equivalent to an appointment: The same statute enacted, that the commissioners might sue in the name of their clerk for the recovery of any penalty or rate, or any other sum or sums of money at any time due or payable from or by any water or gas company, or commissioners of sewers, or any other person or persons, due or payable by virtue of any local act or that act: Held, that the commissioners might sue in the name of their clerk to recover from the assignees of their banker the balance in his hands at the time when he became bankrupt. *Frost v. Bolland*, T. 7 G. 4. Page 611

7. Where bankers employed by commissioners of pavements had received on account of the commissioners certain exchequer bills, which they afterwards sold, and received the proceeds, and before this money had been paid to the commissioners, became bankrupts: Held, that the commissioners were entitled, under the 57 G. 3. c. 29. s. 51. (set out in the last case), to recover in full from the assignees of the bankrupts the balance due to them; for that the section referred to was not confined to monies received by virtue of rates

or assessments, but included all monies received "for and on account of the commissioners," and when the bankers sold the exchequer bills, they must be considered as having received the proceeds to the use of the owners of the bills. *Dougan v. Bolland and Others. Assignees*, T. 7 G. 4. Page 625

8. A bond, upon the face of it, appeared to be conditioned for the payment of a sum certain; but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them; a judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breach or executing a writ of inquiry: Held, first, that this was a bond substantially conditioned for the performance of an agreement within the 8 & 9 W. 3. c. 11. s. 8., and that the obligees ought to have assigned breaches. Secondly, that the indenture, by virtue of which the judgment was entered up, was in legal effect a cognovit actionem within the meaning of the third section of the 3 G. 4. c. 39., or if not, that it was a contrivance to defeat the provisions of that statute; and the indenture not having been filed with the proper officer, within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the Court, upon an application by the assignees of the obligor, who had be-

come

come bankrupt, ordered the execution to be withdrawn. *Hurst v. Jennings, T. 7 G. 4.* Page 650

BARON AND FEME.

A husband is liable for necessities provided for his wife pending a suit in the ecclesiastical court, and before alimony decreed, although a decree afterwards made directed the alimony to be paid from a date before the time when the necessities were provided for the wife. *Keegan v. Smith, E. 7 G. 4.* 375

BILL OF EXCHANGE.

See FORGED CHECK.

An indorsement upon a promissory note written with a pencil is a valid indorsement within the custom of merchants. *Geary v. Physic, H. 6 & 7 G. 4.* 234

2. Where a promissory note expressed to be for value received was made in favour of an infant aged nine years, and in an action upon the note by the payee against the executors of the maker, no evidence of consideration being given, the learned Judge told the jury, that the note being for value received, imported that a good consideration existed, and that gratitude to the infant's father or affection to the child would suffice: Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient; and a new trial was granted. Semble, that an intention to evade the legacy duty would not have been a good consideration. *Holliday v. Atkinson, E. 7 G. 4.* 501

BOND.

See INSOLVENT ACT, 1. REPLEVIN BOND.

A bond, upon the face of it, appeared to be conditioned for the

payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was *agreed* that it should be lawful for the obligee in the bond to commence an action, and to proceed to judgment whenever they should think fit; and upon judgment being obtained to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of this deed, the obligees issued execution, without assigning breaches or executing a writ of inquiry: Held, that this was a bond substantially conditioned for the performance of an agreement in writing, within the 8 & 9 W. 3. c. 11. s. 8., and that the obligees, therefore, ought to have assigned breaches. *Hurst v. Jennings, T. 7 G. 4.* Page 650

BROKER.

Where a broker, having made a contract, entered it in his book, but did not sign it, and afterwards signed and delivered bought and sold notes to the contracting parties, materially differing from each other: Held, that there was no valid contract in writing to bind the parties. *Grant and Others v. Fletcher and Another, E. 7 G. 4.* 496

CANAL.

Where a canal was made under the 8 G. 3. c. 38., which did not give the proprietors power to appropriate the water raised by engines from mines near the canal, and another canal was made under the 23 G. 3. c. 92., which gave to the proprietors power to appropriate the water raised by engines from mines within 1000 yards of the canal,
3 Q 4

CHURCHWARDENS.

2. The 13 G. 3. c. 78. s. 48. requires that the accounts of the surveyors of the highways should be laid before one justice, and if he refuses to allow them, they are to be taken before the justices at petty sessions, where such parts as are objected to by the one justice are to be examined, and to be allowed or disallowed as the justices think fit: Held, that the justices at petty sessions have no original jurisdiction over the accounts, and an order having been made by them for the allowance of a surveyor's accounts, which had not been previously laid before one justice, the Court granted a certiorari to remove it, and quashed the order. *The King v. The Justices of Somersetshire*, T. 7 G. 4. Page 816

CHARTER-PARTY.

By a charter-party, the freighter of a ship agreed to pay for her 200*l.* per month for six months certain, and so in proportion for any longer time that she might be in his employ. The ship was to be kept in repair by the owner. Before the termination of the voyage for which the ship was chartered, certain repairs were necessary, which occupied a period of twenty-eight days: Held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight. *Ripley and Another v. Scaife*, H. 6 & 7 G. 4. 167

CHURCHWARDENS.

Land belonging to a parish was occupied by A., and he paid rent to the churchwardens. They executed a lease of the same land for a term of years to B., and gave A. notice of the lease. In an action for use and occupation by B. against A.: Held, that A. was not

CONVICTION.

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estopped by having paid rent to the churchwardens from disputing B.'s title, and that the latter could not derive a valid title from the churchwardens. *Phillips v. Pearce*, E. 7 G. 4. Page 433

COMMISSIONERS OF PAVEMENT.

See BANKRUPT, 6, 7.

COGNOVIT ACTIONEM.

See BANKRUPT, 8.

COMMON.

The Lord of a manor may, in respect of common land in his own manor, have a right to turn his own sheep on the common of an adjoining manor. *Earl of Sefton v. Court*, T. 7 G. 4. 917

CONSPIRACY.

Indictment against four for a conspiracy; two pleaded not guilty; one pleaded in abatement, to which plea there was a demurrer, and the fourth never appeared. Before the argument of the demurrer the record was taken down to trial; one of those who pleaded not guilty was acquitted, and the other was found guilty of conspiring with him who pleaded in abatement." The demurrer was afterwards argued, and judgment of respondeat ouster given, whereupon a plea of not guilty was pleaded: Held, that the Court might, before the trial of that defendant, pronounce judgment upon the one that had been found guilty. *The King v. J. S. S. Cooke*, E. 7 G. 4. 538

CONVICTION.

1. Whether a conviction of a waterman for carrying in his boat upon the river *Thames* more persons than

than are allowed by law, must be founded upon testimony given upon oath, quare.

That point being doubtful, the Court refused a mandamus to compel a magistrate to enforce the conviction. *Rex v. Broderip, Esq.*, H. 6 & 7 G. 4. Page 239

2. By the 6 G. 4. c. 108. s. 3. it was enacted, that vessels of a certain description found "in any part of the *British or Irish Channels*, or elsewhere on the high seas, within 100 leagues of the coasts of the United Kingdom," having "in any manner attached thereto" casks of certain dimensions, "of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits, (unless such casks are really necessary for the use of such vessel, or are a part of her cargo, and included in the regular official documents of such vessel,)" the casks, vessel, &c. shall be forfeited. By s. 49, certain persons found to have been on board such vessels liable to forfeiture, are subjected to certain punishments. A conviction stated that *A. B.* was convicted of having been found on board a vessel liable to forfeiture; "for that it was found in the *British Channel*, having in a certain manner attached thereto divers, to wit, twenty casks (of the dimensions mentioned in s. 3.), and of the sort or description used, or intended to be used, for the smuggling of spirits, the said casks not being really necessary for the use of the vessel, and included in the regular official documents of the vessel:" Held, first, that the vessel being found in the *British Channel*, it was not necessary to allege that she was within 100 leagues of the coast. Secondly, that the statement that the casks were, "in a certain manner" attached to the vessel was sufficient.

Thirdly, that it was not necessary to negative that the casks were part of the cargo, the conviction stating that they were not included in the official documents of the vessel. Fourthly, that the allegation that the casks were "of the sort or description used, or intended to be used, for the smuggling of spirits," being in the alternative, was bad. *Ex parte Pain*, H. 6 & 7 G. 4. Page 251

COPYHOLDER.

1. Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold: Held, that at the expiration of the two years, the copyholder might maintain an ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency, and the estate would not vest in the lord without any act done by him. *Doe dem. Evans, v. Evans*, T. 7 G. 4. 584
2. Where copyholder in fee surrendered to the uses of a prior settlement, which contained a power to revoke the uses therein declared, and limit new ones: Held, that uses limited in execution of this power were good, although they had the effect of defeating prior vested estates. *Bodington v. Abernethy*, T. 7 G. 4. 776

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The first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition. *Stockdale v. Onwhyn*, H. 6 & 7 G. 4. 173

CORONER.

CORONER.

Where a coroner holds two or more inquisitions at the same place on the same day, he is only entitled to one sum of 9d. a mile for traveling expences, from the place of his abode to the place where the inquisitions are holden. *The King v. The Justices of Warwick, E. 7 G. 4.* Page 430

CORPORATION.

1. Where a charter incorporated "the men, free burgesses of the borough of C.," and declared that for ever thereafter there should be within the borough to be chosen out of the free burgesses eighteen common councilmen, and then nominated eighteen persons to be the first common councilmen: Held, that this charter virtually made them free burgesses also. *The King v. Downes, H. 6 & 7 G. 4.* 182
2. By an ancient parliament roll it appeared, that the Commons by their petition exhibited in parliament prayed King Edward the Third, that the charter made to his liege burgesses of the town of Bristol, and the franchises by him granted to his said burgesses, should be ratified and confirmed in that parliament. The answer to the petition was, that it was assented and agreed in parliament that the franchises whereof the petition made mention, should be ratified and confirmed under the king's great seal. The charter was ratified by King Edward the Third accordingly: Held, that the crown was not prevented by this proceeding in parliament from granting a new charter to the burgesses of Bristol, varying the mode

of electing a mayor from that provided for in the charter recited in the petition to the king in parliament.

Queen Anne, by charter, granted to the burgesses of Bristol, that they should be a body corporate, &c. &c.; and she released to the corporation that power of removing its members which had been reserved by a former charter of King Charles the Second, and released any just cause of complaint which might be against the corporation for having acted in opposition to it: Held, that it did not thereby appear that the queen granted this charter in consideration of the former charter granted by King Charles the Second; and that the queen's charter was not therefore void, although the supposed charter of Car. 2. did not exist. *The King v. Haythorne, E. 7 G. 4.* Page 410

3. By the governing charter of a borough, there were to be ten aldermen and ten capital burgesses, and vacancies in the body of aldermen were to be filled up out of the capital burgesses: Held, that the acceptance of the office of alderman by a capital burgess, even under a void election, operated as a surrender of the latter office; and that a person so elected, and afterwards ousted on quo warranto, was not thereby restored to the office of capital burgess: and, therefore, where a capital burgess became an alderman de facto by means of a void election, and in the character of alderman attended and voted at an election of a mayor, but was afterwards ousted on quo warranto: Held, that he could not be considered as having attended and voted as a capital burgess. *The King v. Hughes, T. 7 G. 4.* 886

COSTS.

COSTS.

See PRINCIPAL AND AGENT.

1. Sheriff arrested *A. B.* on the 13th November upon a writ returnable the 15th, and suffered him to go at large without giving a bail bond, and afterwards returned *cepi corpus*. Bail above were put in on the 17th of December, and on the same day *A. B.* was rendered, but notice of render was not given until the 13th of January. An action against the sheriff for the escape was commenced on the 19th of December. The Court stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion. *Brookhouse v. The Sheriff of Derbyshire*, *H. 6 & 7 G. 4.* Page 244
2. Where the Court, after verdict for the plaintiff, granted a new trial without mentioning the costs, and the plaintiff discontinued: Held, that the defendant was not entitled to the costs of the trial. *Gray v. Cox*, *E. 7 G. 4.* 458
3. By the *Middlesex* court of conscience act, 23 G. 2. c. 33. s. 19., the defendant is entitled to double costs, if the jury find a verdict for less than 40s: Held, that in such case, the verdict of the jury is conclusive, and a verdict having been found for 1*l.* 13s., in an action brought to recover the amount of an apothecary's bill, the Court ordered a suggestion to be entered, although it appeared by affidavit that the debt originally exceeded 40s., and had been reduced by partial payments on account, and although the plaintiff had failed in proving some of the items in his bill. *Chadwick v. Bunning*, *E. 7 G. 4.* 532
4. Upon a quo warranto information for usurping the office of bailiff, (he being the returning officer) of a borough sending burgesses, to

parliament, but not a town porate, judgment having been given for the crown: Held, that the latter was not entitled to costs the 9 Ann. c. 20. *Rex v. M^{rs} T. 7 G. 4.* Page

5. Where an attorney's bill is produced on taxation by a sixth party the client is entitled to the cost of taxation. They are not in the discretion of the Court. *Higg v. Woolcott*, *T. 7 G. 4.*
6. Where a true bill for perjury was found, and the judge at the assizes having refused to try it on account of manifest imperfection in the record, a new bill was preferred, whereupon the defendant was found guilty, but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred a new indictment (for the same offence) and removed it into this Court. *certiorari*, the Court refused to stay the proceedings upon that indictment, until the prosecutor paid the costs of the former proceeding. *The King v. Tremearne*, *T. 7 G. 4.* 7

COURT OF REQUESTS.

See COSTS, 3.

COVENANT.

1. Where an indenture was made between "*A.* for and on behalf of *B.* on the one part, and *C.* on the other part." *A.* being thereunto authorized by writing under his hand but not under seal, and executed the deed in his own name: Held, that *B.* could not maintain covenant on the deed, although the covenants were expressed to be made by *C.*, to a lease with *B.* *Berkeley v. Hardy*, *T. 7 G. 4.* 3
2. Where in covenant against a signee of a lease, the plaintiff declared that all the right, &c. of the lessor

lessee vested in the defendant by assignment; and that afterwards the premises were out of repair, and defendant pleaded in bar, that for one period he was possessed of one-sixth of the premises as tenant in common with *A.*, *B.*, and *C.*; and for another period, of one-third as tenant in common with *B.* and *C.*, and that no more or greater interest in the premises ever came to him by assignment: Held, that the plea was bad in substance, as it could not be a bar to the whole action; that it was bad in form also, as it merely confessed that defendant had possession of part of the premises, and not that he was assignee. *Semble*, that the defendant should have pleaded in abatement, and should have shewn how the other persons became tenants in common with him. *Merceron v. Dowson*, *E. 7 G. 4.* Page 479

DEED.

See COVENANT, 1.

1. Sir *C. H.* tenant in tail, in possession of certain hereditaments and premises, subject to an outstanding term by indenture, in order to bar the estate tail, and all remainders expectant thereupon, and to limit the same to himself in fee, and in consideration of 10*s.*, granted, bargained, and sold the said hereditaments and premises, and the reversion, &c. thereof to *A.* and *B.*, their heirs and assigns, to hold to them *A.* and *B.*, to the use of *A.*, that he might become tenant of the freehold of the said premises, in order to suffer a recovery. The deed was afterwards duly enrolled as a bargain and sale: Held, that it operated as a grant of the reversion to *A.* and *B.*, and that *A.* became solely seised of the premises, so as to be

a good tenant of the freehold of the entirety. *Haggerston, Bart., v. Hanbury and Another*, *H. 6 & 7 G. 4.* Page 101

2. A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the licence of the lessor. The lessee, in *January 1825*, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In *April 1825*, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of *January 1825*, was an act of bankruptcy and void, that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture. *Doe dem. Lloyd v. Powell and Others, Assignees*, *H. 6 & 7 G. 4.* 308

3. A woman before her marriage carried on trade, and being lame kept a horse and gig for the purpose of going round to her customers. In contemplation of marriage, she by deed conveyed to a trustee all her household furniture, goods, and chattels enumerated in a schedule, and the stock in trade, materials, and other articles then belonging to her, *in and about her said business*. The horse and gig were not included in the schedule, but after her marriage were used by her as before. In an action against the sheriff for taking the horse and gig under an execution against the husband, the jury found, that at the time when the deed was executed the horse and gig belonged to the woman, "in and about her business:" Held, that it was the property of the trustee, *Dean v. Brown*, *E. 7 G. 4.* 336

4. Where a party to any instrument seals

or to any person for his use, is not essential.

Delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all controul over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.

Doc dem. Garnons v. Knight, T. 7 G. 4.

Page 671

5. By lease and release *M. H.* conveyed to *J. W.*, and to his heirs and assigns, certain freehold and copyhold premises, to hold the same unto the said *J. W.*, his heirs and assigns, from and immediately after the death of *M. H.*, to, for, and upon the several uses, ends, intents, and purposes thereafter mentioned: Held, that by the premises an immediate estate of freehold was given to *J. W.*, and that the habendum had not the effect of rendering the deed void, as giving a freehold in futuro. *Goodtitle on the demise of Dodwell v. Gibbs, T. 7 G. 4.* 709

6. By deed, lessor demised certain lands in the county of *Dorset*, except and always reserved out of

J. C., then the above lands to fall to the *first male heir of the branch of my uncle R. C.'s family*, yielding and paying unto such of the daughters of the aforesaid *R. C.*, which shall be then living, the sum of 100*l.* each at the time of the taking possession of the aforesaid estate." At the time when the will was made *R. C.* was dead, having left five daughters, all married; the eldest had several daughters, but no son; each of the others had sons; and all these persons were known to the testator. *J. C.* died without issue, and the fourth daughter of *R. C.* died (before any of her sisters, and during the continuance of the life estates given by the will) leaving a son: Held, that her son was entitled to the *T.* estate, as being the *first male heir* of the branch of *R. C.'s* family, per *Holroyd* and *Littledale* Js.; *Bayley* J. dissentiente. *Doe* dem. *Winter v. Perratt*, *H.* 6 & 7 G. 4. Page 48

2. Where *A. B.*, seised in fee of one moiety of certain premises in the county of *S.*, and tenant for life, with power of appointment by deed or will of the other moiety, devised as follows: "I give and devise all my freehold estates in *L.* and county of *S.* or elsewhere, to my nephew *J. K.* for life, on condition, that out of the rents thereof he do from time to time keep such estates in repair:" Held, that this did not operate as an execution of the power, and passed that moiety only of which testator was seised in fee. *Denn* on the demise of *Nowell v. Roake* (in error), *T.* 7 G. 4. 720

3. *A. B.* devised land to trustees in trust, to permit his daughter to receive the rents to her own use for her life; and from and after her death, he devised the same

"unto the heirs of the body of his daughter, share and share alike, their heirs and assigns for ever." At the time of the death of the testator, the daughter had one child, and afterwards had eleven others: Held, that the words "heirs of the body" in this will meant *children*, and that the child born before the testator's death took a vested remainder in fee, subject to open and let in those who might be born afterwards. *Right* dem. *Shortridge v. Creber*, *T.* 7 G. 4. Page 866

4. Testator, by will duly executed, devised as follows: "On the attainment of the age of twenty-one years of the eldest son of *G. H.*, I give my real estate in *P.* to the said son for life, remainder to his first and every other son in strict settlement, and so on to every son of the said *G. H.*, remainder over. The eldest son attained the age of twenty-one, suffered a recovery to the use of himself in fee, and died, leaving a son, who died an infant and unmarried, and three daughters. The second son of *G. H.* attained the age of twenty-one, and left a son, still living: Held, that this son of the second son of *G. H.* took an estate tail under the will. *Le Hunt v. Hobson*, *T.* 7 G. 4. 903

EASEMENT.

See PLEADING, 9.

EJECTMENT.

See COPYHOLDER, 1.

1. Where, in ejectment, *A.* was admitted to defend alone as landlord, and died before the termination of the action, having devised all his real estates to *B.*, and the statute of limitations prevented the lessor of

give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill." *Granger v. George*, H. 6 & 7 G. 4.

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5. Where a declaration on a policy of assurance on goods, averred that it was effected in the names of the plaintiffs, as agents, and that A., B., C., and D. were interested in the goods to the full amount insured, and that the policy was effected on their account and for their sole use and benefit, A. being called as a witness for the plaintiffs, was objected to, and thereupon they gave in evidence a deed poll executed by A., before the commencement of the action, whereby he released to the plaintiffs all actions which he might have by reason of the policy, or for any monies to be recovered by them from the underwriters. They also gave in evidence an indenture, executed by A. after the commencement of the action, whereby (after reciting that plaintiffs had effected the policy; that A., B., C., and D. were the persons interested; that actions had been commenced in the names of the plaintiffs; and that they being desirous of an indemnity against the costs, the Court of C. P. had ordered A., B., C., and D. to indemnify, and that L. and R. had agreed to do it) A., B., C., and D., in consideration thereof and of 10s., assigned to L. and R. all their interest in the policy, and all benefit to be derived therefrom, and all monies to be recovered in the said actions, to and for their own exclusive use and benefit;" Held, that A. was, at all events, still liable to the attorney employed

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to bring the action, and therefore incompetent.

Semble, That the assignment to L. and R. was illegal, as maintenance. *Bell v. Smith and Others* (in error), H. 6 & 7 G. 4. Page 188

6. Declaration stated, that one A. was seised in fee of a messuage or inn, and yard thereto adjoining, and by indenture demised the same to the plaintiff for a term of years, which was undetermined; that defendant was possessed of a certain other yard next to and adjoining the premises of the plaintiff, as tenant thereof to A. B.; and that the defendant and his landlord granted to A., his heirs and assigns, licence and authority to make and construct, at the costs of A., a certain gutter or drain from and out of the said messuage or inn, into and across, and out of a certain part of the yard of the defendant, unto and into the yard of the plaintiff; and that A., his heirs and assigns, and his farmers and tenants, occupiers of the messuage and yard, should have the foul water collected in the scullery of the said messuage or inn, to run and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the yard of the defendant, unto and into the yard of the plaintiff, for so long time as need and occasion should require for the convenient occupation of the messuage or its appurtenances. Breach, that defendant, without notice, obstructed the drain. Another count stated the grant to be for so long time as the defendant should be and continue in possession or occupation of the said last-mentioned land, or so long as the same should be requisite for the convenient occupation of the messuage.

3 R

1. Whether a conviction of a waterman for carrying in his boat upon the river *Thames* more persons than are allowed by law, must be founded upon testimony given upon oath, *quære*.

That point being doubtful, the Court refused a mandamus to compel a magistrate to enforce the conviction. *Rex v. Broderip, Esq* II. 6 & 7 G. 4. 23

8. Declaration stated that the plaintiff agreed to let, and *A. B.* agreed to take, the milking of thirty cows for the sum of 7*l.* 10*s.* per annum per cow, from the 14th of *February*, the rent to be paid quarterly in advance, on the 14th of *February*, the 14th of *May*, the 14th of *August*, and the 14th of *November* and the defendant agreed to pay the rent at the times therein mentioned. The plaintiff then averred performance of the agreement by him, and that *A. B.* took the milking of the thirty cows, and alleged as a breach the non-payment by the defendant of the rent, which became due on the 14th of *November*. It appeared in evidence at the trial, that in *May* it was agreed between the plaintiff and *A. B.*, the latter having then thirty-two cows, that the plaintiff instead of taking away two at the

stated the declaration in the suit in replevin, the avowry and cognizance for rent in arrear, and that such proceedings were thereupon had, that it was considered by the Court that the tenant should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, and that the defendants in replevin should go thereof without day, and that they should have a return of the goods. And after reciting that it was the duty of the defendant as sheriff to take care of the replevin bond, the present declaration alleged, that the tenant did not make a return of the goods according to the condition of the writing obligatory, but therein made default, *whereby* the bond became forfeited. Breach, that the defendant lost the bond, whereby the plaintiff was damaged. At the trial it appeared, that, in *December 1822*, when the replevin bond was taken, the defendant was sheriff of the county of C., but that at the time when the plaint was removed out of the county court, he had ceased to be sheriff: Held, that this was no variance, the substance of the allegation being, that the plaint was removed out of the county court in which it was levied, and that having been proved by the record of the judgment in the replevin suit. It appeared that the jury, after finding that the rent in arrear was 97*l.* 10*s.*, and assessing the damages besides costs, at the prayer of the plaintiff and her bailiffs, according to the statute 17 *Car. 2. c. 7.* proceeded to inquire of the arrears of rent, and the value of the distress, and found the arrears to be 97*l.* 10*s.*, and the value of the distress to be the same. Besides the common law judgment, as stated in the declar-

ation, there was a judgment under the statute 17 *Car. 2. c. 7.* that the defendants should recover against the plaintiff in replevin 97*l.* 10*s.*, and another sum for costs, and that the defendants should have execution thereof. There was also a prayer by the defendants in replevin, for a writ of *fi. fa.* to the sheriff, and averment that it was granted to them, and it was proved that a *fi. fa.* in fact issued, to which the sheriff returned *nulla bona*, but it was not proved that *any writ de retorno habendo had been issued*: Held, that the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with success, that being a breach within the meaning of the words "*prosecuting with effect*," and, therefore, that the plaintiff in this action had sustained an injury, and was entitled to recover, although no writ *de retorno habendo* had been issued.

Held also, that although the plaintiff had elected to proceed under the statute 17 *Car. 2. c. 7.*, still he was not confined to his execution under that statute, but might also proceed against the sureties upon the replevin bond, or against the sheriff for his negligence in the loss of it.

Held also, that assuming the plaintiff had not proved the breach alleged in the declaration, yet as it appeared that there had been a breach of the condition of the bond by reason of the plaintiff in replevin not having prosecuted his suit with effect, the plaintiff was entitled to recover, although a breach in that respect was not formally assigned. *Perreau v. Bevan*, *H. 6 & 7 G. 4.* Page 284

10. A probate stamp is *prima facie* evidence that the executor has

Doe dem. Wood and Another v. Teage and Others, E. 7 G. 4. 335

12. In case against the sheriff for a false return to a fi. fa., the declaration stated, that by the judgment of the Court, the plaintiff recovered against *A. B.* 39*l.*, which were adjudged to him for his damages by him sustained as well by occasion of his not performing *certain promises and undertakings* as for his costs, &c. At the trial, it appeared by the judgment produced in evidence, that as to all the counts in the declaration except the first, a remittitur was entered, and that the damages were given for the non-performance of the promise and undertaking in that count mentioned: Held, that this was a fatal variance. *Edwards v. Lucas and Another*, E. 7 G. 4. 339

13. Where in assumpsit for goods sold and delivered, to which the general issue was pleaded, a witness called by the plaintiff to prove the defendant's liability, admitted on the voir dire that he (witness) was jointly liable: Held, that this did not render him incompetent. *Blackett v. Weir*, E. 7 G. 4. 385

14. In assumpsit by an administratrix

lease, which was produced by a party to whom he had assigned it: Held, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease. It was averred in the declaration, that the defendant continued in possession until the end of the term, and whilst he was in possession as such assignee suffered the premises to be out of repair. The proof was, that he had ceased to be assignee before the expiration of the term: Held, that this was not any variance. *Burnett and Others, Executors, v. Lynch*, T. 7 G. 4.

Page 589

18. In an action against the sheriff for a false return of nulla bona to a writ of fieri facias, the sheriff proved that he had seized all the goods of the debtor under a fieri facias in another suit, before the plaintiffs' writ was delivered to him. The plaintiffs in answer proved that the judgment upon which the first execution was sued out, was entered up upon a warrant of attorney fraudulently executed by the debtor in order to defeat the plaintiffs' execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff, on the first day of the next term, was served with a rule to return the writ of fieri facias under which he had first levied. He did not give any notice to the plaintiffs by whom the second fieri facias had been sued out, that he had been served with such a rule, and at the expiration of the six day's mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff, at whose suit the first fieri facias had been sued out: Held, that this was misconduct in the sheriff, and rendered him liable to the plaintiffs in the second execution.

Quere, whether the sheriff, if not guilty of such negligence or misconduct, would have been liable to the action. *Warmoll and Another v. Young*, T. 7 G. 4. Page 660

19. Where in ejectment the plaintiff gave evidence of some acts of ownership exercised upon the land in dispute by the lessor's ancestor, and of a fine levied by him about the same time; and the defendant proved some acts of ownership by the vicar, and gave evidence which tended to show that the land was formerly part of the church-yard; the Judge refused to leave it as a question to the jury, whether the parties to the fine had any estate of freehold, but told them that the fine was a conclusive bar to the vicar. On error, held, that this was wrong, and the judgment was reversed. An adverse possession for twenty years is not a bar to a rector or vicar, except as against the same incumbent who submitted to such possession. *Runcorn v. Doe on the demise of J. Cooper* (in error), T. 7 G. 4.

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20. Where in case against a carrier for the loss of goods delivered to him at *Dublin* to be conveyed to *Liverpool*, it was objected for the defendant, that unless the goods were proved to be duly entered at the custom-house, the importation was illegal, and the contract with the carrier void: Held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered. *Sissons v. Dixon and Others*, T. 7 G. 4. 758
21. Semble, that the owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be owner of the soil. *Duke of Somerset v. Fogwell*, T. 7 G. 4.

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αc. The agreement given in evidence, purported to be made by an agent for the wife of *A.* and *B.* only, but *A.* had subsequently received rent from the tenant: Held, that the consideration was not proved as alleged, inasmuch as *A.* was not bound by the agreement before the receipt of rent, and therefore was not a joint contractor ab initio. The second count stated, that the defendant was tenant to the plaintiffs, and in consideration had promised to use the lands in a husbandlike manner. The proof was, that he had agreed to farm the land in a husbandlike manner, to be kept constantly in grass: Held, that this also was a variance. *Saunderson v. Griffiths*, T. 7 G. 4. Page 909 V

EXECUTION.

See BANKRUPT, 5. 8. SHERIFF, 1.

FINE.

See EVIDENCE, 19.

FISHERY.

Where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted

statute 29 Car. 2. c. 3. s. 17., must state the price for which the goods were sold. *Elmore v. Kingscote*, T. 7 G. 4. Page 583

2. A verbal agreement made on the 25th of September for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the fourth section of the statute of frauds, but a sale of goods, wares, and merchandizes within the seventeenth section. *Evans v. Roberts*, T. 7 G. 4. 829

FREIGHT.

By a charter-party, the freighter of a ship agreed to pay for her 200*l.* per month for six months certain, and so in proportion for any longer time that she might be in his employ. The ship was to be kept in repair by the owner. Before the termination of the voyage for which the ship was chartered, certain repairs were necessary, which occupied a period of twenty-eight days: Held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight. *Ripley v. Scaife*, H. 6 & 7 G. 4. 167

FREEHOLD IN FUTURO.

See DEED, 5.

HIGHWAYS. See RATE.

INCLOSURE ACT.

1. An inclosure act authorized the commissioners to stop up old roads in the parish, besides those over the lands to be inclosed, provided it were not done without the concur-

rence of two justices. Semble, that under this clause the concurrence of two justices was necessary to warrant the stopping up of any part of a public footway which passed through an old inclosure. By the 41 G. 3. c. 109. s. 8., the commissioners are authorized to set out and appoint the public carriage roads and highways through and over the lands and grounds to be inclosed, and to divert, turn, and stop up any of the roads and tracks upon and over all or any part of the said lands and grounds: provided, that in case the commissioners shall be empowered by any local act to stop up any old or accustomed road passing or leading through any part of the old inclosures in such parish, the same shall in no case be done without the concurrence and order of two justices: Held, that under this section the commissioners were authorized to stop up or divert footways as well as carriage roads; and that the proviso at the end of the section was not confined to carriage roads, but extended to every species of ways; and, therefore, where the commissioners were empowered by the local inclosure act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held, that in order effectually to stop up a public footway, passing partly over the lands to be inclosed, and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices, and no such order or concurrence having been obtained, it was held, that a footway which the commissioners ordered to be stopped up, had not been effectually stopped, but continued a public footway. *Logan v. Burton*, E. 7 G. 4. Page 513

2. Where an inclosure act directed
3 R 4 that

JURY.

ing due, *Collins v. Lightfoot*, T. 7 G. 4. Page 581

INSURANCE.

Upon a policy of insurance upon ship at and from *London* to *New South Wales*, and at and from thence to all ports and places in the *East Indies* or *South America*, with liberty for the said ship, in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, *Madeira*, *Cape of Good Hope*, *St. Helena*, and where-soever the ship might proceed to, as well on this as on the other sides of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards: Held, that after the arrival of the ship at *New South Wales*, she was protected by the policy so long only as she was sailing on a voyage either to *South America* or to the *East Indies*, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to *South America* or to the *East Indies*. *Bottomley v. Bovill*, H. 6 & 7 G. 4. 210

JUDGMENT, as in case of a *Non-suit*.

See PRACTICE, 16.

JURY.

Where, on the trial of an indictment for perjury, it being necessary to swear talesmen from the common jury panel to serve on the jury, and one *J. Williams* being called, his son, *R. H. Williams*, (at the request of his father, and without

LANDLORD & TENANT. 973

collusion with the prosecutor or defendant,) appeared for him and was sworn and served on the jury, he not being of age, nor having a qualification by estate, nor being on any panel: Held, that there was a mistrial, and that a rule obtained for a new trial must be made absolute. *The King v. Tremearne*, H. 6 & 7 G. 4. Page 254

JUSTICES.

1. Upon an appeal against an order for the allowance of overseers' accounts: a magistrate, a rated inhabitant of the parish, cannot vote either on the determination of the appeal, or on a question as to granting a case for the opinion of this Court. *The King v. Gudridge and Others*, E. 7 G. 4. 459
2. The 13 G. 3. c. 78. s. 48. requires that the accounts of the surveyors of highways should be laid before one justice, and if he refuses to allow them, they are to be taken before the justices at petty sessions, where such parts as were objected to by the one justice are to be examined, and to be allowed or disallowed as the justices think fit: Held, that the justices at petty sessions had no original jurisdiction over the accounts; and an order having been made by them for the allowance of a surveyor's accounts, which had not been previously laid before one justice, the Court granted a certiorari to remove it, and quashed the order. *Rex v. The Justices of Somersetshire*, T. 7 G. 4. 816

LANDLORD AND TENANT.

See BANKRUPT, 2. DEED, 6. LEASE.

1. Tenant from year to year at a rent payable half yearly, without giving any notice to the landlord quitted

to the second tenant. *Hall v. Burgess*, E. 7 G. 4. Page 332

2. Land belonging to a parish was occupied by *A.*, and he paid rent to the churchwardens. They executed a lease of the same land for a term of years to *B.*, and gave *A.* notice of the lease. In an action for use and occupation by *B.* against *A.*: Held, that *A.* was not estopped by having paid rent to the churchwardens from disputing *B.*'s title, and that the latter could not derive a valid title from the churchwardens. *Phillips v Pearce*, E. 7 G. 4. 433

LARCENY.

The statute 3 G. 4. c. 38. s. 2. enacts, that if any servant shall steal any money from his master, and shall be convicted thereof, and be *entitled to the benefit of clergy*, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted and entitled to benefit of clergy, shall be transported for fourteen years: Held, that a servant convicted of petit larceny was not within the meaning of this statute, and that he was subject to be transported for seven years only.

The King v. Ellis, E. 7 G. 4. 433

LICENCE.

See EVIDENCE, 6. PLEADING, 9.

LIMITATIONS, STATUTE OF.

1. The statute of limitations is a bar to an action of trover, commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period.

The declaration was filed generally, as of *Michaelmas* term: Held, that the defendant might give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill." *Granger v. George*, H. 6 & 7 G. 4. Page 149

2. Declaration stated that the plaintiff had contracted with *A. B.* to lend him the sum of 3000*l.* at interest; the repayment, with interest, to be secured by a warrant of attorney and certain mortgages of freehold and leasehold premises, provided they should be found to be a sufficient security for the same; that the plaintiff retained defendant as an attorney, to ascertain whether they would be a sufficient security; that the defendant accepted such retainer, and that it became his duty to use due care and diligence to ascertain whether the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.* and interest. Breach, that defendant did not use due care and diligence in that behalf, but wholly neglected so to do, and, on the contrary, falsely represented to the plaintiff, that

the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.* with interest, whereupon the plaintiff lent the 3000*l.* to *A. B.*; that they were not a sufficient security, by reason whereof the plaintiff had wholly lost the interest due and payable on the said sum of 3000*l.*, amounting to a large sum, to wit, the sum of 1000*l.*, and was likely wholly to lose the said principal sum of 3000*l.* At the trial it appeared, that in the year 1814 the defendant had been retained by the plaintiff to ascertain whether the warrant of attorney and mortgages were a sufficient security for the 3000*l.* and interest, and that at that time he represented they were so. In the year 1820, (the interest to that time having been regularly paid,) it was discovered that the warrant of attorney and mortgages were not a sufficient security: Held, that the misconduct or negligence of the attorney constituted the cause of action, and that the statute of limitations began to run from the time when the defendant had been guilty of such misconduct, and not from the time when it was discovered that the securities were insufficient. *Howell v. Young*, H. 6 & 7 G. 4. Page 259

3. Where in ejectment, *A.* was admitted to defend alone as landlord, and died before the termination of the action, having devised all his real estates to *B.*, and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the Court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless *B.* would appear and defend the action as landlord. *Doe dem. Grubb v. Grubb*, E. 7 G. 4. 457

LUNATIC.

expire at *Michaelmas* 1809. In *December* 1799, *A.* took a further lease of the same premises for sixty years, to commence from *Michaelmas* 1809. The lessor died in *December* 1800, and devised the premises in question to *A.*, the lessee, for his life. By lease and release, *A.* in 1806 conveyed his life estate to *B.* Held, that *A.*'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life. *Doe dem. Rawlings and Others v. Walker and Others*, *H. 6 & 7 G. 4.*

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NOTICE OF APPEAL.

See *APPEAL*.

OVERSEER.

See *APPEAL*, 2.

OUTLAWRY.

Where, in error, to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *exigi facias*, the plaintiff in error was beyond seas; and defendant pleaded, that before the awarding and issuing of the *exigi facias*, plaintiff in error of his fraud and covin, and in order to defeat defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of *England*, and of such his fraud and covin voluntarily remained in parts beyond the seas until after the outlawry, whereupon issue was joined and found for the defendant: Held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error non obstante veredicto. *Bryan v. Wagstaff* (in error), *E. 7 G. 4.*

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OVERSEERS.

A pauper, being casually in the parish of *A.*, met with an accident which disabled her, and which required immediate medical assistance. The constable of that parish improperly removed her to her own (which was the adjoining) parish, and sent for the surgeon of that parish to attend her: Held, that it was the duty of the parish officers of *A.* to have taken the pauper to the nearest convenient house in *A.*, and to have provided medical attendance there, and that they could not, by improperly removing her to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them, and that they were therefore liable to pay the surgeon's bill. *Tomlinson v. Bentall and Another*, *T. 7 G. 4.*

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PARDON.

See *COPYHOLDER*.

PARTNERSHIP.

1. An attorney entered into a written contract, whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted; no time was expressly fixed for the commencement of the partnership: Held, that no time being expressly appointed, the partnership commenced from the date of the agreement. *Williams v. Jones*, *H. 6 & 7 G. 4.* 108
2. *A.*, *B.*, and *C.* were in partnership in trade. *A.* retired from the firm, and notice of that fact was given to *D.*, a creditor of the firm, and that *B.* and *C.* continued the business, and assumed the funds, and charged themselves with the debts

3. Where *A.*, the keeper of a coach office and a part owner in several coaches, made a contract with *B.* for the carriage of parcels, which he was in the habit of sending from that office to various places: Held, that this bound the owners of all the coaches in which *A.* was a part owner, and as well those who became partners after the making of the contract, as those who were so before. *Helsby and Others v. Mcars and Others, E.* 7 G. 4. 504 2.

PAVEMENT COMMISSONERS.

See BANKRUPT, 6, 7.

PAYMENT.

1. *A.*, on the 18th of March 1824, paid into the *Totness* country bank a quantity of notes of a bank at *Dartmouth* to bear interest from that day. The *Totness* bankers sent the notes early on the following morning to the *Dartmouth* bank. Upon the receipt of them there, the latter, according to their usual course of dealing with the *Totness* bankers, gave them credit in account for the amount of the

fectly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act; nor shall any such trustee let out for hire any waggon, wain, cart, &c., or any horse, &c., for the use of any turnpike road *for which he shall act* as a trustee, nor by himself or any other person for or on his account directly or indirectly receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act during the time he shall be acting as a trustee of such road, and that every trustee so offending shall for every such offence forfeit 100*l*." Sect. 143. enacts, "That if the penalty shall exceed the sum of 20*l*., it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending previous to the commencement of such action, and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed." One *A.* had contracted with the trustees of a turnpike road to make certain improvements on the road, and he agreed to perform the same for a specific sum. One of the trustees afterwards agreed with *A.* to let him his horses and cart at the rate of 5*s.* per day, and he did so let them, and they were used on that part of the road which was agreed to be improved by *A.*: Held, that the trustee was liable to the penalty imposed by section 65. of the act.

In the notice of action, it was not stated that the defendant, at

the time when he let his cart and horses to hire, was a trustee *acting* in execution of the act: Held, that the notice was therefore bad.

Held, also, that a party omitting to give the notice required by act of parliament was barred, not merely of his right to recover the costs of his action, but of his right of action altogether. *Towsey v. White*, *H. 6 & 7 G. 4.* Page 125

PERJURY.

See INDICTMENT, 1.

PLEADING.

1. Extra parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title; and, therefore, if they sue in the ecclesiastical court to be quieted in the possession of such seats, this Court will grant a prohibition. *Semble*, That they cannot establish such a claim even by prescription. *Byerley v. Windus*, *H. 6 & 7 G. 4.* 1
2. The 3 *G. 4. c. 126. s. 65.* enacts, "That no trustee of any turnpike road shall have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act; nor shall any such trustee let out for hire any waggon, wain, cart, &c., or any horse, &c., for the use of any turnpike road *for which he shall act* as a trustee, nor by himself or by any other person for or on his account directly or indirectly receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act during the time he shall be acting as a trustee of such road, and that every trustee so offending shall for every

an action against any person for publishing a pirated edition. *Stockdale v. Onwhyn*, H. 6 & 7 G. 4.

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7. Words spoken of an innkeeper imputing insolvency are actionable, although at the time when they were spoken, an innkeeper was not subject to the bankrupt laws. *Whittington v. Gladwin*, H. 6 & 7 G. 4.

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8. In an action against the bank of *England*, the declaration stated that the plaintiff was lawfully possessed of certain 3 per cent. annuities in the care of the defendants, and standing in their books in the name of the plaintiff, for the purpose, amongst other things, of paying him all the dividends which might accrue due in respect of the stock, whilst the same should not be transferred in the said books with the authority of the plaintiff, and that the plaintiff was entitled to the stock, and that it had not been transferred in the books to any person by his order or authority, and thereupon it became the duty of the defendants to pay to the plaintiff the dividends whilst the same was not transferred, yet the defendants, although requested, had not paid them: Held, upon error, that this declaration was bad, on the ground that it did not appear that the dividends had ever been issued by government to the Bank, and that until they were issued, it was not the duty of the bank to pay them. *The Governor and Company of the Bank of England v. Davis* (in error), H. 6 & 7 G. 4.

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9. Declaration stated that one A. was seised in fee of a messuage or inn and yard thereto adjoining, and by indenture demised the same to the plaintiff for a term of years which was undetermined; that defendant was possessed of a certain

other yard next to and adjoining the premises of the plaintiff, as tenant thereof to A. B.; and that the defendant and his landlord granted to A., his heirs and assigns, licence and authority to make and construct, at the costs of A., a certain gutter or drain from and out of the said messuage or inn, into and across, and out of a certain part of the yard of the defendant, unto and into the yard of the plaintiff; and that A., his heirs and assigns, and his farmers and tenants, occupiers of the messuage and yard, should have the foul water collected in the scullery of the said messuage or inn, to run and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the yard of the defendant, unto and into the yard of the plaintiff, for so long time as need and occasion should require for the convenient occupation of the messuage or its appurtenances. Breach, that defendant without notice obstructed the drain. Another count stated the grant to be for so long time as the defendant should be and continue in possession or occupation of the said last mentioned land, or so long as the same should be requisite for the convenient occupation of the messuage. It appeared in evidence, that the licence to construct and continue the drain was by parol: Held, that as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed. *Howlins v. Shipham*, H. 6 & 7 G. 4. Page 221

10. Indictment for perjury alleged, that on the trial of an indictment against J. H. defendant, intending

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to

defendant knowingly or corruptly swore falsely.

Another count alleged, that at the trial of *J. H.* he was found guilty, "by means of the false and material testimony of defendant in the first count mentioned;" that a rule nisi for a new trial was granted, and that defendant knowingly, falsely, wilfully, and corruptly made affidavit that the evidence given by him at the trial of *J. H.* was true, "whereas it was false in the particulars in the first count assigned and set forth:" Held, that this count also was bad, for that it should have averred distinctly that defendant was sworn as a witness, and deposed to certain facts at the trial of *J. H.* instead of leaving it to be taken by intendment. *The King v. Stevens*, II. 6 & 7 G. 4.

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11. Declaration stated that the plaintiff agreed to let, and *A. B.* agreed to take, the milking of thirty cows for the sum of 7*l.* 10*s.* per annum per cow from the 14th *February*, the rent to be paid quarterly in advance, on the 14th of *February*, the 14th of *May*, the 14th of *August*, and the 14th of *November*, and the defendant agreed to pay

plevied and delivered the goods to the tenant, that the latter appeared at the next county court of the sheriff, and there levied his plaint against the plaintiff and her bailiffs for taking and detaining his goods and chattels, &c. which plaint afterwards, to wit, on the 25th March 1823, was duly removed out of the county court of the said sheriff of the county of C., into the court of great sessions by a writ of re. fa. lo. It then stated the declaration in the suit in replevin, the avowry and cognizance for rent in arrear; and that such proceedings were thereupon had, that it was considered by the Court that the tenant should take nothing by his writ, but that he and his pledges, to prosecute, should be in mercy, and that the defendants in replevin should go thereof without day, and that they should have a return of the goods. And after reciting that it was the duty of the defendant, as sheriff, to take care of the replevin bond, the present declaration alleged, that the tenant did not make a return of the goods according to the condition of the writing obligatory, but therein made default, whereby the bond became forfeited. The breach was, that the defendant lost the bond, whereby the plaintiff was damnified. At the trial it appeared, that in December 1822, when the replevin bond was taken, the defendant was sheriff of the county of C., but that at the time when the plaint was removed out of the county court, he had ceased to be sheriff: Held, that this was no variance, the substance of the allegation being, that the plaint was removed out of the county court in which it was levied, and that having been proved by the record of the judgment in the replevin suit, it appeared

that the jury, after finding that the rent in arrear was 97l. 10s., and assessing the damages, besides costs at the prayer of the plaintiff and her bailiffs, according to the statute 17 Car. 2. c. 7., proceeded to enquire of the arrears of rent, and the value of the distress, and found the arrears to be 97l. 10s., and the value of the distress to be the same. Besides the common law judgment as stated in the declaration, there was a judgment under the statute 17 Car. 2. c. 7., that the defendants should recover against the plaintiff in replevin 97l. 10s., and another sum for costs, and that the defendants should have execution thereof. There was also a prayer by the defendants in replevin for a writ of fi. fa. to the sheriff, and an averment that it was granted to them; and it was proved that a fi. fa., in fact, issued, to which the sheriff returned nulla bona, but it was not proved, that any writ *de retorno habendo* had been issued: Held, that the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with success, that being a breach within the meaning of the words "*prosecuting with effect*," and, therefore, that the plaintiff in this action had sustained an injury, and was entitled to recover, although no writ *de retorno habendo* had been issued.

Held, also, that although the plaintiff had elected to proceed under the statute 17 Car. 2. c. 7. still he was not confined to his execution under that statute, but might also proceed against the sureties upon the replevin bond, or against the sheriff for his negligence in the loss of it.

Held, also, that assuming the plaintiff had not proved the breach alleged in the declaration, yet as

it appeared that there had been a breach of the condition of the bond, by reason of the plaintiff in replevin not having prosecuted his suit with effect, the plaintiff was entitled to recover, although a breach in that respect was not formally assigned. *Perreau v. Bevan*, H. 6 & 7 G. 4. Page 284

13. Where in error to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *exigi facias*, the plaintiff in error was beyond seas; and defendant pleaded, that before the awarding and issuing of the *exigi facias*, plaintiff in error of his fraud and covin, and in order to defeat defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of *England*, and of such his fraud and covin, voluntarily remained in parts beyond the seas until after the outlawry, whereupon issue was joined and found for the defendant: Held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error, non obstante veredicto. *Bryan v. Wagstaff (in error)*, E. 7 G. 4. 314 16
14. A bailiff employed by an attorney to execute writs may maintain an action against him for the fees usually paid on such occasions. *Foster v. Blakelock, Executor*, E. 7 G. 4. 328 17
15. In case against the sheriff for a false return to a *fi. fa.*, the declaration stated, that by the judgment of the Court, the plaintiff recovered against *A. B.* 39*l.*, which were adjudged to him for his damages by him sustained as well by occasion of his not performing *certain promises and undertakings* as for his costs, &c. At the trial, it appeared by the judgment produced in evidence, 18

other persons became tenants in common with him. *Merceron v. Dowson*, E. 7 G. 4. Page 479

19. Trespass for breaking and entering the plaintiff's dwelling-house, and remaining there until the plaintiff paid him a large sum of money, to wit, &c. Justification under a *fi. fa.* to the sheriff of S., and a warrant thereupon to the defendant, as bailiff, directing him to levy — *l.* Replication, that before the said writ and warrant were fully executed, the defendant demanded and received 3*l.* 10*s.* more than he was authorised to levy. On demurrer: Held, that the replication was bad, inasmuch as the facts alleged in it did not make out that the defendant was a trespasser *ab initio*. *Shorland v. Govett*, E. 7 G. 4. 485

20. In assumpsit, by an administratrix upon a promissory note, given to her intestate, it was averred in the declaration, that administration of all and singular the goods and chattels of the intestate was duly granted by the bishop of C. Plea, that the plaintiff never had been, nor was administratrix of all and singular the goods and chattels of the intestate in manner and form as she had alleged in her declaration; and issue being joined on this plea, the letters of administration granted by the bishop of C. were produced by the plaintiff; but it was also proved, that the intestate, at the time of his death, had *bona notabilia* in another diocese in a different province; and no evidence was given as to the residence of the defendant at the death of the intestate: Held, first, that the letters of administration were not void, inasmuch as the other diocese in which the intestate had *bona notabilia* was in a different province.

Held, secondly, that the only question raised upon the issue was, whether the letters of administration were duly granted by the bishop of C., and that it was no part of the issue, whether the defendant, at the death of the intestate, resided within the diocese of C. The fact of his residence elsewhere, if relied upon, ought to have been specially pleaded. *Stokes, Administratrix, v. Bate*, E. 7 G. 4. Page 491

21. The assignee of a rent may maintain debt for arrears of the rent. *Allen v. Bryan*, E. 7 G. 4. 512
22. Debt on bond conditioned for the performance of an award to be made on a day therein named. One of the terms of the submission was, that the arbitrator should examine the witnesses produced by the parties in difference. Plea, that the arbitrator made several appointments for proceeding with the reference, and examined witnesses produced by the plaintiff, and occupied the whole of the time of the meetings respectively in so doing; that plaintiffs on the day when the time for making the award expired, closed their case, and defendant was called upon to enter upon his defence; that at that time an insufficient time remained for the defendant to bring forward and examine his witnesses, that he requested the arbitrator to allow him reasonable time to bring forward and examine his witnesses, which the arbitrator refused, without the consent of the plaintiffs, and which consent the plaintiffs, although requested by the defendant, refused to grant, and the arbitrator refused to allow the defendant any further time, although he had several material witnesses to examine, of which the arbitrator and the plaintiffs had notice: Held, upon general demurrer,

held, by Abbott C.J., and Lamer-
dale J., (Bayley and Holroyd Js.
diss.) that the owner of the car-
riage was not liable to be sued for
such an injury. *Laugher v. Pointer*,
T. 7 G. 4. 547

24. Lessee, by deed poll, assigned
his interest in the demised pre-
mises to A., subject to the pay-
ment of the rent and the perform-
ance of the covenants contained
in the lease. A. took possession,
and occupied the premises under
this assignment, and before the
expiration of the term assigned to a
third person. The lessor sued the
lessee for breaches of covenant
committed during the time that A.
continued assignee of the premises,
and recovered damages against the
lessee: Held, that the lessee
might maintain an action upon the
case founded in tort against A.,
for having neglected to perform
the covenants during the time he
continued assignee, whereby the
lessee sustained damage. It was
averred in the declaration, that
the defendant continued in pos-
session until the end of the term,
and whilst he was in possession as
such assignee, suffered the pre-
mises to be out of repair. The
proof was, that he had ceased to
be assignee before the expiration

defendant to perform all things in the agreement by them to be performed, the defendant promised, &c. The agreement given in evidence, purported to be made by an agent for the wife of *A.* and *B.* only, but *A.* had subsequently received rent from the tenant: Held, that the consideration was not proved as alleged, inasmuch as *A.* was not bound by the agreement before the receipt of rent, and therefore was not a joint contractor ab initio. Another count stated, that the defendant was tenant to the plaintiffs, and in consideration had promised to use the lands in a husbandlike manner. The proof was, that he had agreed to farm the land in a husbandlike manner, to be kept constantly in grass: Held, that this also was a variance. *Saunderson v. Griffiths*, T. 7 G. 4. Page 909

POOR, CASUAL.

See OVERSEERS.

POOR-RATE.

1. By an act of parliament a company was established for lighting the town of *B.* with gas, and they were authorized, with the consent of certain commissioners (appointed under another act of parliament passed for lighting and paving the town of *B.*) to break the ground and lay their pipes in the streets of *B.* The company having so laid their pipes for the purpose of conveying the gas, were held to be rateable to the poor in respect of the land occupied by their pipes, and to the extent of the increased value of the land in consequence of its being used by them for the purpose of conveying the gas. *The King v. The Brighton Gas Light and Coke Company*, E. 7 G. 4. 466

2. By a canal act of the 31 G. 3. c. 31. s. 77. it was enacted, that the company should be rated to all parochial taxes in respect of their lands, &c. in the same proportion as other lands lying near the same should be rated, and as the same lands would be rateable in case the same were the property of individuals in their natural capacity. By a subsequent act of the 38 G. 3. c. 31. s. 20. it was enacted, that the company should be rated to all parochial taxes in respect of the lands used by them for the purposes of the said navigation, in the same proportion as other lands and buildings adjoining or lying near the canal should be rated, but it was further enacted, that it should be lawful for the company to agree with any owner of lands adjoining their lands, taken for the purpose of the said navigation, for an exemption from all rates and taxes in respect of such lands, and for charging the same upon the adjoining lands of such persons, and in all such cases the parochial taxes, rates, &c. which might be thereafter charged upon or payable in respect of the lands so taken for the purposes of the said navigation, should be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof, and the lands of the company should be exempted and discharged therefrom:

Held, first, that by the 31 G. 3. c. 31. s. 77. the company were not liable to be rated for the land used for the purposes of the canal according to its improved value:

Held, secondly, that the 77th section of the 31 G. 3. was not repealed by the 20th section of the 38 G. 3. and that the company were not liable to be rated for the improved value of the land. *The King v. The Inhabitants of St.*

that these duties did not constitute part of the annual profits of the house or land where the light was placed, and were not rateable to the poor. *The King v. Coke*, T. 7 G. 1. 797

4. Where the owner and occupier of an iron-stone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose: Held, that he was not rateable to the poor in respect of the engine. *The King v. The Chapelwardens and Overseers of the Township of Bilston*, T. 7 G. 4. 851

POWER OF APPOINTMENT.

See DEED, 7.

Where *A. B.*, seised in fee of one moiety of certain premises in the county of *S.*, and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows: "I give and devise all my freehold estates in *L.* and county of *S.*, or elsewhere, to my nephew *J. K.* for life, on condition that out of the rents thereof he do from time to time keep such estates in repair:" Held, that this did not constitute a

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the prosecutor's absence. *The King v. Boltz*, E. 7 G. 4. Page 334

6. On moving to set aside an attachment against the sheriff, it is sufficient to entitle the affidavit *Rex v. Sheriff of —*, without naming the cause, although it is convenient to do so.

An exception to bail must be entered in the bail book, and sensible, that written notice of it must be given to the defendant's attorney. *Rex v. The Sheriff of Middlesex*, E. 7 G. 4. 389

7. Where a cause is referred by a Judge's order made by consent of the parties, and the time for making the award is afterwards enlarged by a Judge's order, in moving for an attachment for not performing the award, it must be shown that the order enlarging the time was made by consent. *Halden v. Glasscock*, E. 7 G. 4. 390

8. A plaintiff cannot declare de bene esse upon a latitat returnable on the last general return of a term. *Wilson v. George*, E. 7 G. 4. 454

9. Where in ejectment A. was admitted to defend alone as landlord, and died before the termination of the action, having devised all his real estates to B., and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the Court gave him leave to sign judgment against the casual ejector in the old suit and issue execution thereon, unless B. would appear and defend the action as landlord. *Doe dem. Grubb v. Grubb*, E. 7 G. 4. 457

10. Where the Court, after verdict for the plaintiff, granted a new trial without mentioning the costs, and the plaintiff discontinued: Held, that the defendant was not entitled to the costs of the trial. *Gray v. Cox*, E. 7 G. 4. 458

11. Where a cause and all matters in difference were referred by or-

der of nisi prius, and the arbitrator by his award found that nothing is due to the plaintiff: Held, that this must be considered as a finding, that the plaintiff had no right to recover in the action.

The arbitrator had power to enlarge the time for making his award by indorsement on the order of reference, that order, together with two indorsements enlarging the time, was made a rule of court: Held, that on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.

By the order of reference costs were to abide the event; there were two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The Master taxed the whole costs of the cause, and the reference in one sum to the other defendant, by whom payment was demanded of the plaintiff. The Court refused to grant an attachment for non-payment of those costs. Query, whether the Master had power to tax costs for the two defendants separately. *Dickins v. Jervis and Smith*, E. 7 G. 4. Page 528

12. Where an award under the 9 & 10 W. 3. c. 15. was made after the essoign day, but before the quarto die post: Held, that it was made within the term, and that a motion to set it aside might be made at anytime before the last day of the term next following. *In the Matter of Burt*, T. 7 G. 4. 668

13. Where an appearance is entered for a defendant, and a declaration filed pursuant to the 12 G. 1. c. 29. no demand of plea is necessary. *Free v. Mason*, T. 7 G. 4. 763

14. Where a declaration in ejectment was left at the house of the tenant in possession on *Saturday*, and

and the tenant afterwards acknowledged that he received it on the following *Sunday*, (which was before the *essoign* day): Held, that this was not good service. *Doe v. Roe*, T. 7 G. 4. Page 764

15. Upon a general demurrer to a plea of *nil debet* to an action upon a bond, the Demurrer Book is to be made up by the plaintiff's attorney, and not to be filed with the clerk of the papers. *Herbert v. Taylor*, T. 7 G. 4. 766

16. One of several joint defendants may obtain a rule for judgment as in case of a nonsuit. *Jones v. Gibson and Smith*, T. 7 G. 4. 768

17. A summons for better particulars of the plaintiff's demand was obtained by the defendant four days before the time for pleading expired. The plaintiff's attorney did not attend till the third summons, and the order being then refused, and the time originally allowed for pleading having expired, signed judgment for want of a plea: Held, that as the delay was occasioned by the plaintiff's attorney, the judgment was signed too soon, and was, therefore, irregular. *Glover v. Watmore*, T. 7 G. 4. 769

18. Where a rule or summons for staying the plaintiff's proceedings obtained by the defendant is discharged, the latter is bound to take his next proceeding within the day on which such rule or summons is disposed of. *Hughes v. Walden*, T. 7 G. 4. 770

PRESCRIPTION.

See PROHIBITION.

PRINCIPAL AND AGENT.

It was agreed between A., resident in London, and B., who resided in

Court will grant a prohibition. Semble, that they cannot establish such a claim even by prescription. *Byerley v. Windus and Others*, H. 6 & 7 G. 4. Page 1

2. The stat. 27 G. 3. c. 44. does not limit the time for proceeding in the ecclesiastical court against clerks upon a charge of fornication, if deprivation be the object of the suit; and, therefore, where a suit was instituted in that court against a clerk, charging (amongst other things) fornication committed more than eight months before the commencement of the suit: Held, that a prohibition should go as to proceeding upon that charge for reformation of manners, but that a consultation should be awarded as to proceeding for deprivation. *Free, D. D., v. Burgoyne*, E. 7 G. 4. 400

3. In prohibition a writ of error does not lie from K. B. to the Exchequer Chamber. *Free, D. D., v. Burgoyne*, T. 7 G. 4. 765

PROMISSORY NOTE.

See BANKRUPT, 4. BILL OF EXCHANGE, 1, 2.

RATE.

See POOR RATE.

Where an inclosure act directed that all great tithes payable to the rector of the parish, should be extinguished, and that the commissioners should ascertain the *net value* of such tithes, and affix a *fair clear annual rent* or sum of money per acre in lieu of such tithes, as an adequate compensation for the same to the rector: Held, that the rector was in respect of such rents, rateable to the repair of the highways. *The King v. Lacy, Clerk*, T. 7 G. 4. 702

REMAINDER.

See DEVISE, 3.

REMOVAL, ORDER OF.

Where an order of removal is appealed against, and is quashed generally by the sessions, the appellant on the trial of another appeal may show by evidence the distinct ground upon which the former order was quashed. *The King against the Inhabitants of Wheelock*, E. 7 G. 4. Page 511

REPLEVIN BOND.

See PLEADING, 12.

SETTLEMENT — by Estate.

A. made a parol agreement with *B.* for the purchase of a cottage and garden for 40*l.* *A.* took possession, and paid 30*l.* on account, and resided upon the premises. No conveyance was executed. After *A.* had been in possession twelve months, he sold the property for 40*l.* to *C.*, to whom he gave up the possession. *A.* afterwards paid the remainder of the purchase money to *B.*: Held, that *A.* did not gain any settlement by the purchase of any estate or interest within the statute 9 G. 1. c. 7. s. 5. *The King v. The Inhabitants of Llantillio Grosscyny*, E. 7 G. 4. 461

SETTLEMENT — by Birth.

See EVIDENCE, 15.

SHERIFF.

See COSTS, 2.

In an action against the sheriff for a false return of nulla bona to a writ of

TOLL.

SURETY.

See *INSOLVENT ACT.*

TITHES.

See *RATE.*

TOLL.

See *MARKET, 1.*

1. By a turnpike act certain tolls were imposed upon carriages drawn by horses, another toll upon horses not drawing, and other tolls upon oxen, &c. There was a proviso, that all persons having once paid the toll for their carriages, horses, and cattle, returning the same day with the same carriages, horses, and cattle, should pass toll free. By a subsequent act, reciting that it was expedient to increase the tolls, the provisions in the former act, except with certain alterations, were re-enacted. One of the alterations was, that the former tolls should cease, and that instead thereof there should be paid for every horse or beast of draught drawing a carriage, sixpence. After the passing of the latter act, four horses drawing a stage-coach passed through one of the toll gates in the morning, and the same four horses, drawing a different stage-coach, belonging to the same proprietor, repassed through the same gate in the evening: Held, that no second toll was payable. *Fearnley and Others v. Morley, H. 6 & 7 G. 4.*
Page 25
2. By a turnpike act, a certain toll was imposed upon every horse or other beast drawing any carriage, &c., a certain other toll upon every horse not drawing, and other tolls upon every drove of oxen, &c. There was a proviso, that no col-

TROVER.

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lector should take more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle passing once in the same day through the same or any of the gates on the said roads, such person producing a ticket denoting that such toll had been paid on that day for or in respect of such horse, beast, or other cattle: Held, that a second toll was not payable in respect of the same horses passing once and repassing once in the same day, but drawing a different carriage belonging to the same proprietor. *Jackson v. Curwen, H. 6 & 7 G. 4.*

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TREES.

See *DEED, 6.*

TRESPASS.

A lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber: Held, that as tenant for life or years would have been entitled to them, if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them. *Chan-non v. Patch, T. 7 G. 4.* 897

TROVER.

The statute of limitations is a bar to an action of trover commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order

his default it became impossible for *A.* to deliver the goods at *Totness*, the failure to do so did not bar his action. Thirdly, that *A.* might recover in this action the price of the casks provided for the defendant. *Studdy v. Sanders and Another*, *T. 7 G. 4.* Page 629

4. A verbal agreement made on the 25th of September for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them within the fourth section of the statute of frauds, but a sale of goods, wares, and merchandizes within the seventeenth section. *Evans v. Roberts*, *T. 7 G. 4.* 829
5. Where the owner of a stack of bark entered into a contract to sell it at a certain price *per ton*, and the purchaser agreed to take and pay for it on a day specified; and a part was afterwards weighed and delivered to him: Held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary, in order to ascertain the amount to be paid; and that even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered.

Semle, That an action for goods bargained and sold could not, under such circumstances, have been maintained, per *Little-dale J.* *Simmons v. Swift*, *T. 7 G. 4.* 857

WALES.

See CERTIORARI, I.

WARRANT OF ATTORNEY.

See ANNUITY, I. SHERIFF.

1. Where a warrant of attorney was given with a defeasance, stating it

to be given "as a security for 4000*l.* and lawful interest thereon:" Held, that it was to be construed as a continuing security, and not merely as a security for money then due. *Woolley and Others, Assignees, v. Jennings and Another*, *H. 6 & 7 G. 4.* Page 165

2. A bond, upon the face of it, appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breaches or executing a writ of inquiry; Held, first, that this was a bond substantially conditioned for the performance of an agreement, within the 8 & 9 *W. 3. c. 11. s. 8.*, and that the obligees, therefore, ought to have assigned breaches.

Secondly, that the indenture, by virtue of which the judgment was entered up, was, in legal effect, a cognovit actionem within the meaning of the third section of the 3 *G. 4. c. 39.*, or if not, that it was a contrivance to defeat the provisions of that statute, and the indenture not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the Court,

Court, upon an application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn.
Hurst v. Jennings, T. 7 G. 4.

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WASTE.

See LEASE, 2.

WITNESS.

See EVIDENCE, 5. 11.

WRIT OF ERROR.

In prohibition a writ of error does not lie from K. B. to the Exchequer Chamber. *Free, D. D. v. Burgoyne*, T. 7 G. 4. Page 765

END OF THE FIFTH VOLUME.



